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## Compensation for Unlawful Death in International Law: A Focus on the Inter-American Court of Human Rights

Ben Saul

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# COMPENSATION FOR UNLAWFUL DEATH IN INTERNATIONAL LAW: A FOCUS ON THE INTER-AMERICAN COURT OF HUMAN RIGHTS

BEN SAUL\*

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## INTRODUCTION

After a slow start in the 1980s, the activity of the Inter-American Court of Human Rights ("Court" or "IACHR") rapidly increased during the 1990s. While the American Convention on Human Rights ("American Convention") establishing the Court entered into force in

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\* BA(Hons) LLB(Hons (Syd), D.Phil Candidate and Tutor in International Law, University of Oxford.

1978,<sup>1</sup> the Court did not decide the first contentious case involving an individual complaint against state violence until 1988, seven years after the filing of the petition and ten years after the creation of the Court.<sup>2</sup> The *Velásquez Rodríguez* case involved forced disappearances and breaches of numerous Convention rights in Honduras.<sup>3</sup> Prior to this landmark case, between 1979 and 1981, the Inter-American Commission submitted no contentious cases to the Court and requested no advisory opinions.<sup>4</sup> While a cooperative relationship existed between the Commission and the Court after 1986, significant growth in reparations cases coming before the Court did not occur until the 1990s.

This paper examines the reparations decisions of the Court in cases involving violations of the right to life between 1988 and 2002.

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1. See Inter-American Court of Human Rights, *General Information* (explaining that the Court adopted the American Convention at the Inter-American Specialized Conference on Human Rights, held November 7 through November 22, 1969 in San Jose, Costa Rica), at <http://heiwwww.unige.ch/humanrts/iachr/general.html> (last visited Feb. 1, 2004). The Court entered into force on July 18, 1978. *Id.*

2. See *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988) (proceeding to the Court upon submission by the Inter-American Commission and asserting violations to the right to life and the right to personal liberty established under the American Convention), available at [http://www1.umn.edu/humanrts/iachr/b\\_11\\_12d.htm](http://www1.umn.edu/humanrts/iachr/b_11_12d.htm) (last visited Jan. 15, 2004). The American Convention established the Court and the Inter-American Commission as the twin pillars of human rights supervision and enforcement. Comprised of seven judges from OAS member states, the Court exercises both contentious and advisory jurisdiction. See American Convention on Human Rights, July 18, 1978, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, 139, art. 62(3), 64 [hereinafter American Convention] (establishing that the Court's jurisdiction extends to cases involving the interpretation and application of the Convention's provisions and that the Court has the authority to offer opinions regarding the compatibility of domestic laws with international conventions and protocols), <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm> (last visited Feb. 21, 2004).

3. See *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R. (Ser. C) No. 4, paras. 2-4 (outlining that the case involved claims against Honduran officials for illegal detentions, torture, and disappearances of people).

4. See Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 HUM. RTS. Q. 439, 451 (1990) (stating that in response to the Commission's first request for an advisory opinion, the Court announced that the Commission, unlike OAS members, enjoyed an absolute right to request such an opinion within the framework of the Convention).

Article 4(1) of the American Convention recognizes and protects the universal human right to life stating: “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”<sup>5</sup>

The Court has ruled on numerous occasions that states must make reparations for state violations of the right to life.<sup>6</sup> This paper draws out the key principles of reparation for unlawful death established by the case law of the Court, placing these developments in regional Inter-American law alongside the established principles of international law. It first examines state responsibility for unlawful death and the general principles of reparation that are applicable;<sup>7</sup> the paper then focuses specifically on monetary compensation as the most common form of reparation in unlawful death cases.<sup>8</sup> It then considers the multiple heads of compensation that the Court has awarded, including material damages, moral damages, expenses and costs, and the emerging concepts of “nuclear family patrimonial damages” and “damage to a life plan.”<sup>9</sup> Finally, it compares the compensation amounts awarded during the period of analysis, arguing that the Court has become more generous over time both compared to its own previous awards and compared to the awards of other international tribunals, including the European Court of Human Rights (“ECHR”) and the U.N. Compensation Commission

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5. American Convention, *supra* note 2, art. 4(1).

6. *See, e.g., Trujillo Oroza Case*, Inter-Am. Ct. H.R. (Ser. C) No. 92, para. 60 (establishing the Court’s jurisdiction under the codified common law of state responsibility to order the responsible state to pay reparations and citing several examples of cases in which the Court ordered such reparations, including the *Cantoral Benavides Case*, the *Cesti Hurtado Case*, and the “*Street Children*” Case).

7. *See* discussion *infra* Part A-B (discussing the international law principles behind the Court’s reparation system).

8. *See* discussion *infra* Part C.1 (outlining the international law allowing compensation as reparation for unlawful death).

9. *See* discussion *infra* Part C.2 (explaining how the Court determines what kind of damages to award and what factors are considered in the determination).

(“UNCC”).<sup>10</sup> This paper shows that the regional human rights law developed by the Court has made and continues to make significant jurisprudential contributions to the established international law on compensation for unlawful death.

## I. STATE RESPONSIBILITY FOR UNLAWFUL DEATH

Historically, customary international law of state responsibility has held states internationally responsible for the unlawful death of foreigners within their jurisdiction perpetrated by, or at the direction of, a state official acting within the scope, or apparent scope, of his or her authority.<sup>11</sup> States also are responsible for failing to take adequate measures to prevent unlawful death or injury caused by agents of the state<sup>12</sup> or non-state actors within their jurisdiction.<sup>13</sup> Indeed, as Whiteman writes, “The responsibility under international law is not ordinarily for the act of committing the murder but for the wrong that the respondent state has committed in failing to take sufficiently adequate steps to prevent that act or to apprehend or

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10. See discussion *infra* Part D (noting that the Court awards compensation amounts as an aggregate of all the rights violated, rather than amounts for each violation, and these compensation amounts have been rising since 1989).

11. See, e.g., Caire Case (Fr. v. Mex.), 5 R.I.A.A. 516 (1929) (holding that forces under the command of officers are sufficient proof of the state’s direct responsibility and that a pending domestic case does not preclude the international tribunal from exercising jurisdiction); Youmans Case (U.S. v. Mex.), 4 R.I.A.A. 110 (1926) (holding Mexico responsible for the death of Youmans as a result of the military’s failure to protect the American from a mob). See generally MARJORIE M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 639 (U.S. Govt. Printing Office, 1937) (explaining that a state has international responsibility for injury to an alien for its failure to prevent, apprehend or punish the person who injured the alien).

12. See Yeager v. Iran, 17 Iran-U.S. Cl. Trib. Rep. 92 (1987) (concluding that it is a generally accepted principle of international law to hold states responsible for actions by people exercising elements of government authority or acting on behalf of the state).

13. See WHITEMAN, *supra* note 11, at 639 (clarifying that a person who commits a crime is not chargeable under international law while a state that fails to take the necessary precautions to apprehend and to punish the criminal is).

punish the murderer.”<sup>14</sup> Put simply, the internationally wrongful act must cause the individual’s death.<sup>15</sup> Whiteman notes further:

Not every case involving the death of a national in a foreign country may properly be made the basis of an international claim by the state of which the deceased was a national. A state is not required to guarantee the life, limb or property of the aliens who visit its shores.<sup>16</sup>

Accordingly, there is no responsibility for the common murder of a foreign national by private persons. There must be some act or omission by the state, such as a failure to investigate, apprehend, prosecute, or punish,<sup>17</sup> or some other fault, negligence, bad faith, malfeasance, lack of diligence, or defective administration of justice.<sup>18</sup> States are responsible for disappearances involving state

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14. *Id.*

15. *See id.* at 659 (citing *Cora Kessler*, a case in which the U.S.-Germany Mixed Claims Commission refused a claim by the victim’s spouse because the victim’s death was due to an enlarged liver and not from injuries sustained by the wrongful sinking of the *Lusitania*).

16. *Id.* at 651.

17. *See, e.g.*, *Janes Case* (U.S. v. Mex.), 4 R.I.A.A. 82 (1926) (holding the Mexican government liable for not adequately prosecuting the murderer of Janes, despite eyewitnesses and the local police’s knowledge of the murderer’s location); Letter from Lieutenant-Colonel Miles to Earl Granville (Feb. 9, 1882), in 73 BRIT. AND FOREIGN ST. PAPERS, 1881-82, at 695 (Sir Edward Hertslet & Edward Cecil Hertslet, eds., 1889) (detailing the process by which the British government requested the execution of two Arabs accused of killing a British crew member aboard a British ship to the Sultan of Zanzibar, despite the Sultan’s refusal to investigate the situation, try the accused, or offer reparations to Great Britain); *Francis Case* (Gr. Brit. v. Mex.), 5 R.I.A.A. 99 (1931) (ruling that the execution of Mr. Francis’ murderers demonstrated that the Mexican government did not fail to investigate or otherwise fulfill its responsibilities); *Kidd Case* (Gr. Brit. v. Mex.), 5 R.I.A.A. 41 (1931) (holding the British government responsible for damages for the murder of William Kidd by a band of men); *Fraser Case* (Gr. Brit. v. Mex.), 5 R.I.A.A. 275 (1931) (disallowing the claim because, after the murder of Mr. Fraser by bandits, the Mexican government sent fifty troops to investigate and track the bandits, ultimately leading to their execution).

18. *See, e.g.*, *Home Frontier & Foreign Missionary Society of the United Brethren in Christ* (U.S. v. Gr. Brit.), 6 R.I.A.A. 42 (1920) (holding that because the British government quickly suppressed a rebellion that resulted in damage to the Mission’s property and death of missionaries, it did not violate its international responsibility); *Noyes Case* (U.S. v. Pan.), 6 R.I.A.A. 308 (1933) (finding that the general failure to maintain order and prevent crimes is insufficient to demonstrate a specific failure of duty with regard to the injury of Mr. Noyes by a drunken

officials or agents, such as where a person is taken into official custody and is found murdered,<sup>19</sup> and for deaths in custody due to the non-treatment of illness.<sup>20</sup> Once an unlawful death has occurred, states are further responsible for failing to investigate properly, apprehend, or punish the perpetrator of a killing.<sup>21</sup>

There is, however, no international responsibility for accidental death.<sup>22</sup> Nor is there responsibility for the acts of revolutionaries opposing the sovereign authority, except where the authorities fail to use prompt and appropriate force to suppress the insurrection or fail to provide an appropriate level of protection for foreign interests.<sup>23</sup> State responsibility will not normally exist where the deceased "provoked the trouble that resulted in his death"<sup>24</sup> or contributed

crowd); *Mecham Case* (U.S. v. Mex.), 4 R.I.A.A. 440 (1929) (holding the municipal president liable for his refusal to aid in capturing those who robbed and murdered Lucian Mecham who were located on a ranch within the president's municipality); *Munroe Case* (U.S. v. Mex.), 4 R.I.A.A. 538 (1929) (allowing the claim for responsibility for the Mexican government's failure to protect against mob violence).

19. See *Quintanilla Case* (U.S. v. Mex.), 4 R.I.A.A. 101 (1926) (holding the United States responsible for the murder of Quintanilla while he was in police custody).

20. See *Turner Claim* (U.S. v. Mex.), 4 R.I.A.A. 278 (1927) (holding the Mexican government liable for the death of Turner, who died of an illness that worsened and remained untreated during Turner's two-month illegal detention).

21. See *WHITEMAN*, *supra* note 11, at 639 (explaining that cases claiming liability for the payment of indemnity under international law typically involve situations where the foreign state failed to act adequately against the criminal perpetrator rather than cases arising from a government official's criminal action).

22. See *Cadenhead Case* (Gr. Brit. V. U.S.), 6 R.I.A.A. 40 (1914) (disallowing a claim for the accidental death of Cadenhead, who was shot dead by a U.S. soldier negligently attempting to stop a fleeing prisoner).

23. See *Sambiaggio Case* (Italy v. Venez.), 10 R.I.A.A. 499 (1903) (deciding that the Venezuelan government was not responsible for repaying money that revolutionaries extorted from Sambaggio because acts of revolutionaries are outside of the government's control); see also *Asian Agric. Prod. v. Sri Lanka*, 30 I.L.M. 577 (1991) (ruling that the Sri Lankan government was liable for damage to a shrimp farm and deaths of employees when the government failed to take due diligence in launching attacks against insurgents); *Short v. Iran* (U.S. v. Iran), 16 Iran-U.S. Cl. Trib. Rep. 76, 103 (1987) (holding that a revolutionary government is responsible for the acts of the overthrown government, and for its own acts as a revolutionary movement prior to taking power).

24. *WHITEMAN*, *supra* note 11, at 658.

significantly towards it. The state's obligations to protect foreign nationals also may vary according to the circumstances, taking into account matters such as the voluntary risk assumed in being present in a certain location (for example, in the midst of avoidable civil strife), or the resources available for policing in developing countries.<sup>25</sup>

International responsibility arises from the unlawful death of a foreign national within a state's *jurisdiction*.<sup>26</sup> States are responsible for unlawful deaths not only through territorial jurisdiction, but arising from any exercise of extraterritorial jurisdiction as well. For example, State *A* may be held responsible if its naval forces cause the deaths of civilian nationals of State *B* on the high seas, as occurred in the numerous *Lusitania* cases decided by the U.S.-Germany Mixed Claims Commission.<sup>27</sup>

In traditional law, state responsibility for unlawful death arises where there is a breach of an international obligation owed to other states to protect *foreign nationals*. In such cases, the victim's state has sovereign discretion both to exercise diplomatic protection on behalf of its national and to conduct the claim and distribution of any award.<sup>28</sup> As Whelton notes, "the law of international claims has been at the forefront of human rights law, providing greater protection to foreigners abroad than many individuals can still expect as citizens in

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25. See *Home Frontier & Foreign Missionary Society of the United Brethren in Christ (U.S. v. Gr. Brit.)*, 6 R.I.A.A. 42, 44 (1920) (ruling that the missionaries assumed the risk that the indigenous people could rebel when they chose to live in and expose themselves to the dangers of Sierra Leone).

26. See *WHITEMAN*, *supra* note 11, at 639 (clarifying that domestic law may separately allow compensation for the death of a foreign national without prejudice to the international law claim).

27. See *MIXED CLAIMS COMMISSION, ADMINISTRATIVE DECISIONS & OPINIONS OF A GENERAL NATURE: OPINIONS IN INDIVIDUAL LUSITANIA CLAIMS AND OTHER CASES 195, 208-09* (Gov't Printing Off. 1925) [hereinafter *LUSITANIA CLAIMS*] (explaining that Germany was obligated to pay compensation for damages caused to Americans through German acts).

28. See *Administrative Decision No. V (U.S. v. Ger.)*, 7 R.I.A.A. 119, 119 (1924) (stating that the United States was the only nation entitled to assert the claims of the contract violation and that it also retains the right to decline to press charges when the American national who was injured by the foreign state voluntarily transfers alliance to another nation).



their own country.”<sup>29</sup> Nevertheless, a national possesses no enforceable right to require the state to exercise protection on his or her behalf. Rather, the state asserts its own rights through its nationals.<sup>30</sup> Indeed, the victim’s state may choose to decline to exercise diplomatic protection for a variety of self-interested political, economic, military, or diplomatic reasons.<sup>31</sup>

International human rights law significantly expands the traditional law of state responsibility. Previously, international law necessarily required states “to establish that the person claiming to have suffered a pecuniary loss is a national of the claimant state as a condition precedent to the establishment of an internationally valid claim.”<sup>32</sup> Now, in principle, any state may seek to hold another state internationally responsible, under treaty or custom, for causing the death of anyone – national or foreigner – in violation of the law of nations.<sup>33</sup> Claims no longer depend on the exercise of diplomatic protection on behalf of nationals.<sup>34</sup> This possibility is particularly compelling in relation to human rights norms owed *erga omnes*.<sup>35</sup> In

29. Carmel Whelton, *The United Nations Compensation Commission and International Law: A Fresh Approach*, 25 OTTAWA L. REV. 607, 611 (1993).

30. See Panevezys-Saldutiskis Railway (Est. v. Lith.), 1939 P.C.I.J. (ser. E) No. 15, at 95 (defining the rule that only the state can exercise diplomatic protection, unless there is a special agreement that does not allow the state to extend diplomatic protection over its nationals).

31. See, e.g., David Bederman, *The United Nations Compensation Commission and the Tradition of International Claims Settlement*, 27 N.Y.U. J. INT'L L. & POL. 1, 25 (1995) (explaining that the Mavromattis Palestine Concessions Case, originally a claim between a businessman and an administrator, resulted in a dispute between Great Britain and Greece and illustrates the point that such international disputes can exacerbate diplomatic tensions rather than resolve the original disputes).

32. WHITEMAN, *supra* note 11, at 641.

33. See DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 47 (Oxford Univ. Press 1999) (explaining that traditional inter-state responsibilities of international law do not match the objectives of the human rights establishment because human rights violations generally cause indirect injury to the state whereas breaches of treaty obligations cause direct injury to the state).

34. See *id.* at 48 (describing how the International Law Commission has expanded the definition of “injured state” with the effect that in cases of a breach of obligation, every state party to the convention is considered an injured state).

35. See *id.* (noting that in fact, human rights obligations are obligations *erga omnes*, giving all states the right to defend them).

practice, states seldom pursue such claims, either out of fear of potential reciprocity of claims or because states may not consider human rights breaches as serious injuries to the state itself.<sup>36</sup>

Consequently, while the classical framework of state responsibility remains intact – a state owes its international obligation to protect the human right to life multilaterally to other states and not to individuals – the beneficiaries of the rules of state responsibility have become primarily individuals rather than states.<sup>37</sup> International human rights law has infused the inter-state paradigm of state responsibility and international obligations with a new concern and respect for the individual, irrespective of nationality.<sup>38</sup>

It is in this context that one must read Article 33 of the International Law Commission's Articles on State Responsibility.<sup>39</sup> While Article 33(1) states that the obligations of a responsible state "may be owed to another State, to several States, or to the international community as a whole,"<sup>40</sup> Article 33(2) qualifies this by stating that the Articles are "without prejudice to any right, arising from the international responsibility of a State, which accrues directly to any person or entity other than a State."<sup>41</sup> Accordingly, while the international obligation exists only between states, the

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36. *See id.* at 49 (explaining that states are reluctant to accuse other states of human rights violations, primarily because states may view such accusations as hostile acts).

37. *See* Eric Rosand, *The Right to Compensation in Bosnia: An Unfulfilled Promise and a Challenge to International Law*, 33 CORNELL INT'L L.J. 113, 135 (2000) (detailing that according to the principles of state responsibility, a state is responsible for all wrongful acts that breach an international obligation and must provide reparation to the injured party).

38. *See id.* (stating that the right to live in one's homeland is a prerequisite to the enjoyment of other human rights and as such, is a human right in itself).

39. *See* JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY* 209 (2002) (discussing the scope and consequences of the international obligations that states have to persons whose human rights they have violated).

40. *See id.* (explaining that the severity of the breach may affect the extent to which the state is obligated to end the injury against the victim and to compensate the victim).

41. *See id.* at 210 (recognizing the possibility that the Court may need to hold persons or entities other than states responsible for violations of human rights norms).

beneficiaries of the obligation may be more numerous and entitled individually to certain procedural or substantive rights.<sup>42</sup>

The Inter-American human rights system establishes regional procedures enabling victims of rights violations to seek redress.<sup>43</sup> Article 1(1) of the American Convention requires party-states to “undertake to respect the rights and freedoms recognized herein and to ensure all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination.”<sup>44</sup> Article 25(1) confers on individuals “the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution of laws of the state concerned or by this Convention,” including judicial remedies.<sup>45</sup>

Only party-states and the Inter-American Commission have the right to submit cases to the Inter-American Court under Article 61(1) of the Convention.<sup>46</sup> Individual, group, or non-governmental organization complainants may petition the Inter-American Commission.<sup>47</sup> In turn, the Inter-American Commission may refer the case to the Court if parties cannot reach a friendly settlement and so long as they have followed certain investigative and reporting

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42. *See id.* at 209 (finding that Article 36 of the Vienna Convention on Consular Relations created individual rights that the detainee’s national state could invoke in the International Court of Justice).

43. *See* American Convention, *supra* note 2, pmb. (emphasizing the importance that people must enjoy freedom from “fear and want” and may only do so if there are conditions “whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights”).

44. *See id.* art. 1 (illustrating discrimination in the forms of race, color, sex, language, religion, political, national origin, social origin, economic status, birth, or other social conditions).

45. *See id.* art. 25 (providing that in addition to judicial remedy, state parties agree to offer a legal system that possesses competent authority to enforce remedies for the victims).

46. *See id.* art. 61 (reiterating that state parties must follow specific procedures before the Court will hear their cases).

47. *See id.* art. 44 (noting that the party’s petition may contain denunciations or complaints of violations by a state).

procedures.<sup>48</sup> Of course, states must have submitted to the contentious jurisdiction of the Court.<sup>49</sup> Individual petitioners may appoint legal representatives only in proceedings before the Inter-American Commission, not the Court.<sup>50</sup> Therefore, individuals do not have direct standing at the international level to enforce the international human rights obligations of states, notwithstanding that the states direct those obligations towards protecting individuals.<sup>51</sup> Given that the resource constraints and policy considerations of the Commission as a kind of public prosecutor may not always coincide with the interests of the victims, this standing limitation can be problematic.<sup>52</sup> In some cases, for example, the Commission and the victims' representatives at the reparations phase—the only stage at

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48. *See id.* arts. 48-51 (providing that prior to settlement negotiations and upon receiving a petition, the Inter-American Commission will: (1) request information from the state government allegedly responsible for violation; (2) determine whether grounds exist for the petition of the accusing party; (3) decide whether the petition is admissible; (4) carry out investigations, when needed; (5) require states to provide relevant information, receiving oral and written statements, if the Commission calls for the latter; and (6) make itself available to the parties involved). Additionally, in cases of friendly settlements, the Inter-American Commission shall compose a report with a statement of the facts and the solution reached that the Secretary General of the Organization of American States will publish. *Id.*

49. *See id.* art. 45 (clarifying that for a state to submit to the jurisdiction of the Court, it must have ratified the American Convention and recognized in a formal declaration the competence of the Commission to consider its petitions).

50. *See* Dinah Shelton, *Remedies in the Inter-American System*, in PROCEEDINGS OF THE 92ND ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 202, 205 (American Society of International Law 1998) (comparing the Inter-American Commission to the European Commission and noting that while both represent the public interest, the Inter-American Commission has the added burden of advocating for the victim).

51. *See id.* (excepting the recent development that individuals may plead before the Court during the reparations phase of their case).

52. *See* HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 649 (1996) (reporting that the Commission spends a mere US \$400,000 of its approximately US \$1,700,000 budget on witness and expert expenses, preparation of reports, on-site visits, and Commissioner meetings). While the Inter-American Commission meets for four weeks a year, the European Court meets for sixteen weeks a year. *Id.*

which victims can directly represent themselves—have made quite different assessments of the quantum of compensation.<sup>53</sup>

The procedure for claiming reparation in the Inter-American system is different than actions in domestic law, where available, for the enforcement of a human right.<sup>54</sup> In the latter case, the obligation of the domestic authorities to protect individual human rights gives rise to a direct relation between the state and the individual; the individual *per se* can hold the state responsible.<sup>55</sup> There is arguably no reason why individuals should possess an international legal personality or capacity that is more limited than that of states when it comes to enforcing the specific field of international human rights obligations.<sup>56</sup> An insistence on the exhaustion of local remedies followed by the implementation of a judicial admissibility procedure before the merits phase, to screen out claims which are *prima facie* unmeritorious, can allay any fear of a flood of individual complaints to the Inter-American Court.<sup>57</sup> The Commission could then focus more selectively and intensively on claims involving legal questions

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53. See Castillo Páez Case, Reparations, Judgment of Nov. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 43, para. 75 (1998) (finding that Peru would have to compensate and reimburse the victim's next of kin only for expenses that he spent in pursuing the Páez case to the Peruvian authorities); see also "Street Children" Case, Reparations, Judgment of May 26, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 77, para. 68 (2001) (demanding that the victim's family prove regular financial support that would have continued if the victim had not died).

54. See United Nations Enable, *International Norms and Standards Relating to Disability* (illustrating that most treaty obligations require state government to guarantee and defend human rights by taking constructive steps to implement positive measures), at <http://www.un.org/esa/socdev/enable/comp103.htm> (last visited Jan. 23, 2004).

55. See SHELTON, *supra* note 33, at 60 (contrasting earlier Western law that relied upon Roman law, in which one could only ascribe responsibility for damages onto individuals, and not onto the state).

56. See *id.* at 52 (arguing that any action states take in addressing human rights violations have a greater impact than on one individual victim).

57. See *id.* at 68 (addressing the original remedies that states implement to guarantee preservation of the law and to rectify the rights of the victim in addition to the more standard remedies of non-intrusive declaratory judgments, damages, injunctions, and affirmative orders).

of particular public policy importance rather than expending its scarce resources on routine claims involving less complex disputes.<sup>58</sup>

## II. PRINCIPLES OF REPARATION FOR UNLAWFUL DEATH

### A. INTERNATIONAL LAW

Although not adopted by states in treaty form, the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles") are an authoritative starting point in considering the modern law of reparations.<sup>59</sup> Under Article 30, a state responsible for an internationally wrongful act is under an obligation (a) to cease that act, if it is continuing, and (b) to offer appropriate assurances and guarantees of non-repetition.<sup>60</sup> Article 31 further requires a responsible state to make full reparation for the injury caused by the internationally wrongful act.<sup>61</sup> An injury is defined as "any damage, whether material or moral, caused by the internationally wrongful act."<sup>62</sup> The possible forms that reparation may take are set out in Article 34, and include "restitution, compensation and satisfaction, either singly or in combination."<sup>63</sup>

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58. *See id.* at 52 (revealing the promotion of compliance with human rights norms as advancing public policy).

59. *See* CRAWFORD, *supra* note 39, at 61 (communicating that the ILC Articles purport to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of states for their internationally wrongful acts).

60. *Draft Articles on Responsibility of States for internationally wrongful acts*, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, art. 30, UN Doc. A/56/10 (2001) [hereinafter *Draft Articles*], at [http://www.un.org/law/ilc/texts/State\\_responsibility/responsibilityfra.htm](http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm) (last visited Feb. 21, 2004). *See generally* CRAWFORD, *supra* note 39, at 196 (explaining that these are both aspects of restoration, and they both repair the negative effect of the violation by ending the wrongful conduct and preventing future harm).

61. *Draft Articles*, *supra* note 60, art. 31.

62. *Id.*

63. *Draft Articles*, *supra* note 60, art. 34.

Restitution, where possible and proportionate, takes priority over other forms of reparation.<sup>64</sup> The purpose and scope of restitution are detailed in Article 35, which states that restitution should reestablish the situation that existed before the wrongful act, provided and to the extent that restitution (a) is not materially impossible, and (b) does not involve a burden disproportionate to the benefit derived from restitution instead of compensation.<sup>65</sup> The ILC Articles help settle the legal controversy of whether international law “supports the primacy (or even the possibility) . . . of *restitutio in integrum*,” that is, the restoration of the prior situation and the reparation of the consequences of the violation.<sup>66</sup>

Where restitution or compensation cannot better an injury, Article 37 states that a responsible state must give satisfaction for the injury, such as through an acknowledgement of the breach, an expression of regret, a formal apology, or other appropriate modality, including

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64. See *Factory at Chorzów Case* (F.R.G. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 48 (resolving that when ascertaining reparations that Poland must pay to an injured German factory, the Permanent Court of International Justice must take into account the value of property and the rights and interests of the factory to restore itself to its state prior to the injury); see also *Martini Case* (Italy v. Venez.), 2 R.I.A.A. 975 (1930) (deciding that after suffering an injury, the contracting party is entitled to not only an indemnity for the injury and a reimbursement of lost investment, but also to a recompense of profits that the contracting party would have reached relying on the contract). See generally *Temple of Preah Vihear Case* (Cambodia v. Thail.), 1962 I.C.J. 6, 37 (Judgment of June 15) (ruling that Thailand, subsequent to violating the territorial sovereignty of Cambodia, must withdraw its military and police forces and restore any items Thai authorities may have taken from Cambodia's Temple of Preah Vihear).

65. *Draft Articles*, *supra* note 60, art. 35. See generally CRAWFORD, *supra* note 39, at 213 (contrasting differing definitions of restitution, including a return to the situation that existed before the injury, and an establishment of the situation that the victim would be in if the injury had never taken place).

66. See CHRISTINE D. GRAY, *JUDICIAL REMEDIES IN INTERNATIONAL LAW* 13 (1990) (explicating that *restitutio in integrum* falls into a legal category and a material category). The legal category of *restitutio in integrum* concerns when a tribunal orders the repeal or amendment of a measure of the defendant state's legislature, executive, or judiciary of a defendant's state. *Id.* The material category of *restitutio in integrum* contains an order for the culpable state to repair or return property it seized illegitimately. *Id.*

punishment of the perpetrators or a declaration of illegality.<sup>67</sup> Such satisfaction should be proportionate and not humiliating.<sup>68</sup>

The ILC Articles constitute a generic draft instrument for dealing with the many different manifestations of international wrongs attracting state responsibility. The U.N. Commission on Human Rights' Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law ("Basic Principles on Reparation") suggests a more extensive range of reparations specifically relevant to human rights violations.<sup>69</sup> While not legally binding, Basic Principle 15 stipulates that reparation for rights violations must be "adequate, effective and prompt," and proportional to the gravity of

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67. See *Draft Articles*, *supra* note 60, art. 37.

68. See CRAWFORD, *supra* note 39, at 212 (considering notions of fairness and sensibility in excusing states from restitution when the burden of restitution on the responsible state is acutely disproportional with the benefit that the victim would receive from restitution).

69. See *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, G.A. Res. 1999/33, U.N. GAOR, 56th Sess., Annex, Agenda Item 11(d), at 5, U.N. Doc. E/CN.4/2000/62 (2000) [hereinafter *Basic Principles*] (enhancing the basic principles and guidelines of reparation as originally outlined in U.N. Resolution 1998/43, including restitution and compensation for physical or mental harm, lost earnings, and harm to reputation or dignity, for example). U.N. Resolution 1989/13 of the U.N. Sub-Committee on Prevention of Discrimination and Protection of Minorities asked Theo Van Boven to study the right to restitution, compensation, and rehabilitation for victims of human rights violations. *Id.* at 1-3. After Van Boven produced three successive drafts of basic principles and guidelines, the U.N. Commission on Human Rights approved Van Boven's final draft in Res 1996/35. *Id.* The U.N. Commission on Human Rights Resolution 1998/43 appointed Special Rapporteur M.C. Bassiouni to revise Van Boven's final draft, taking into account the views of states and nongovernmental organizations. Bassiouni's revision also considered the Basic Principles and Guidelines on Impunity by Special Rapporteur Louis Joinet and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. *Id.*; see also Christian Tomuschat, *Reparation for Victims of Grave Human Rights Violations*, 10 TUL. J. INT'L & COMP. L. 157, 160 (2002) (maintaining that the international community is following a trend of establishing mechanisms whereby victims may seek reparations for violations of human rights); Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 999 (creating an international criminal court to address and possess jurisdiction over issues of human rights, such as crimes of genocide, crimes against humanity, war crimes, and the crime of aggression), <http://www.un.org/law/icc/statute/romefra.htm> (last visited Feb. 4, 2004).



the violations and the harm suffered.<sup>70</sup> Basic Principle 21 reiterates that the primary forms of reparation include restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition.<sup>71</sup> Basic Principle 22 enumerates specific examples of restitution as including “restoration of liberty, legal rights, social status, family life and citizenship; return to one’s place of residence; and restoration of employment and return of property.”<sup>72</sup> Basic Principle 25 details a range of measures that may provide satisfaction and guarantees of non-repetition.<sup>73</sup> Particular attention is given to measures for preventing the recurrence of violations.<sup>74</sup>

Importantly, the Basic Principles on Reparation suggest rules applicable to cases where a human rights violation is not attributable to a state. Basic Principle 17 provides that a non-state party responsible for a violation should provide reparation to the victim or to the state if the state has already provided reparation.<sup>75</sup> When the responsible non-state party is unable or unwilling to do so, Basic Principle 18 encourages the state to provide reparation to victims who have sustained bodily injury or impairment of physical or

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70. See *Basic Principles*, *supra* note 69, at 9 (addressing concerns that the Court may give victims reparations that are not appropriate for the injury, either because the reparation is too meager for the severity of a crime or because the reparation is too rewarding for the less substantial nature of a crime).

71. See *id.* at 10 (stating that the Court should provide reparations in accordance with the state’s domestic law and international obligations).

72. *Id.*

73. See *id.* at 11 (noting measures of satisfaction, including cessation; verification and disclosure; the search for, identification of, and reburial of the killed or disappeared; official declaration or judicial decision restoring the dignity, reputation, and rights of the victim and connected persons; apology; sanctions against those responsible; commemorations and tributes; human rights education and training; and prevention of repetition).

74. See *id.* (including among the measures for preventing recurrence of the violations civilian control of military and security forces; restricting the jurisdiction of military tribunals; judicial independence; protecting legal, media, human rights, and related professions; human rights training; codes of conduct and ethical norms in public service; and conflict resolution and preventative intervention).

75. See *id.* at 9 (outlining the duties of the party responsible for the violation towards the state and the victim).

mental health as a result of rights violations.<sup>76</sup> States should provide similar support to victims' families, particularly dependants of persons who have died or become physically or mentally incapacitated as a result of rights violations.<sup>77</sup> Furthermore, Basic Principle 19 urges states to enforce domestic judgments for reparation against private individuals or entities responsible for violations, in addition to enforcing valid foreign judgments against such non-state perpetrators.<sup>78</sup>

## B. INTER-AMERICAN COURT

The statutory basis for reparations decisions in the Inter-American Court is Article 63(1) of the American Convention, which states:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.<sup>79</sup>

The wording of Article 63(1) confers a broad discretion on the Inter-American Court to ensure the protection of rights and to remedy the consequences of rights violations, including but not limited to the payment of "fair" compensation.<sup>80</sup> The language of the American Convention is broader and more detailed than the

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76. See *Basic Principles*, *supra* note 69, at 10. (suggesting that states should establish national reparation funds exclusively for human rights victims and search for additional funding when they need to augment their resources).

77. See *id.* (extending reparations past the individual to those who rely both mentally and economically on the individual).

78. See *id.* (illustrating proper methods for expanding a state's ability to pay reparations).

79. See American Convention, *supra* note 2, art. 63(1) (accepting that the Court will espouse provisional measures in pending cases when it is necessary to prevent irreversible damage to people and in cases of great exigency).

80. See Dinah Shelton, *Reparations in the Inter-American System*, in *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS*, 151, 152 (David J. Harris & Stephen Livingstone eds., 1998) (stating that Article 63 gives the Inter-American Court the power to ensure future respect for the right or freedom that was violated, remedy the consequences of the violation, and compensate for the harm).

comparable provision on reparations in the European Convention on Human Rights, Article 50, which permits the ECHR to “afford just satisfaction to the injured party.”<sup>81</sup> Indeed, commentators have described the Court’s judgments as representing “the most wide-reaching remedies afforded in international human rights law.”<sup>82</sup>

The Court has repeatedly held that Article 63(1) of the American Convention codifies a fundamental rule of customary law - that a state incurs international responsibility for a wrongful act imputable to it, with the resulting duty to make adequate reparation and eliminate the consequences of the violation.<sup>83</sup> Put another way, any

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81. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 50, 213 U.N.T.S. 222 (permitting just satisfaction only if the ECHR finds that a High Contracting Party has taken a resolution in conflict, wholly or partly, with obligations that the European Convention for the Protection of Human Rights and Fundamental Freedoms sets out and if the domestic law of the High Contracting Party only allows it to make limited reparations for its resolution), <http://www.unhcr.md/article/conv.htm> (last visited Feb. 3, 2004).

82. See Shelton, *supra* note 80, at 153 (explaining the apparent contradiction between the language of Article 63(1) and the less than generous awards of damages given to victims by the Inter-American Court of Human Rights).

83. See, e.g., “Street Children” Case, Reparations, Judgment of May 26, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 77, para. 62 (2001) (remembering that Article 63(1) was a codification of a common law principle); Blake Case, Reparations, Judgment of Jan. 22, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 48, para. 33 (1999) (describing Article 63(1) as a fundamental common law principle); Aloeboetoe et al. Case, Reparations, Judgment of Sept. 10, 1993, Inter-Am. Ct. H.R. (Ser. C) No. 15, para. 43 (1993) (noting that this principle has been recognized by other tribunals, including the International Court of Justice); Garrido and Baigorria Case, Judgment of Aug. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 39, para. 40 (1998) (correlating the right to reparation and the obligation found in Article 63(1)); Castillo Páez Case, Reparations, Judgment of Nov. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 43, para. 50 (1998) (explaining that Article 63(1) is a fundamental principle that is a responsibility of the States); Godínez Cruz Case, Compensatory Damages, Judgment of July 21, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 8, para. 23 (1989) (describing the principle as a general concept of law); Caballero Delgado and Santana Case, Reparations, Judgment of Aug. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 31, para. 15 (1998) (supporting the proposition that Article 63(1) is a fundamental principle of international law by laying out the long history of case law supporting this principle); Case Concerning the Factory Chorzów, 1927 P.C.I.J. (ser. A) No. 9, at 21 (stating that reparation is the “indispensable complement of a failure to apply a convention”); Factory at Chorzów, 1928 P.C.I.J. (ser. A) No. 17, at 29 (explaining that any breach involves an obligation to make reparations); Reparations for Injuries Suffered in the Service of the United

violation of an international obligation that has produced damage entails the obligation to make adequate reparation.<sup>84</sup>

The Court's judgments have broadly interpreted "reparation" as a generic term covering the various ways a state can redress the international responsibility it has incurred. These include *restitutio in integrum*, payment of compensation, satisfaction, and guarantees of non-repetition.<sup>85</sup> The Court has noted that the mode of reparation will

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Nations, 1949 I.C.J. 174, 184 (Apr. 11) (outlining the role of an organization in assuring that members fulfill obligations, including reparations); Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, 1950 I.C.J. 221, at 228 (July 18) (mentioning that obligations to appoint representatives to Treaty Commissions constitutes international responsibility).

84. See, e.g., Suarez Rosero Case, Reparations, Judgment of Jan. 20, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 44, para. 41 (1999) (explaining that reparations include all the ways a state can remedy the international responsibility it has incurred), <http://www.umn.edu/humanrts/iachr/C/44.ing.html> (last visited Jan. 23, 2004); Neira Alegria et al. Case, Reparations, Judgment of Sept. 19, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 29, paras. 36-37 (1996) (stating that international law governs the reparation obligation); "Street Children" Case, Inter-Am. Ct. H.R. (Ser. C) No. 77, para. 59 (remarking that the Court has reiterated this reparation principle through consistent jurisprudence); Durand and Ugarte Case, Reparations, Judgment of Dec. 3, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 89, para. 24 (2001) (listing numerous places that the Court has supported the principle that reparation must be made when an international obligation is violated); Blake Case, Inter-Am. Ct. H.R. (Ser. C) No. 48, para. 33 (characterizing this principle to indicate that a wrong imputable to a state creates a duty in that state to make reparation and end any consequences of the wrong); Castillo Páez Case, Reparations, Judgment of Nov. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 43, para. 84 (1998) (expressing the belief that when a state violates the right to life, mere condemnatory judgment is not sufficient and that pecuniary compensation should play a role); Aloeboetoe et al. Case, Inter-Am. Ct. H.R. (Ser. C) No. 15, paras. 48-49 (admitting that a state cannot provide a remedy for all wrongs, but that those that the state can remedy, ought to be).

85. See, e.g., "Street Children" Case, Inter-Am. Ct. H.R. (Ser. C) No. 77, para. 60 (approving of full restitution when applicable, but requiring the court to pursue measures to compensate when it is not); Durand and Ugarte Case, Inter-Am. Ct. H.R. (Ser. C) No. 89, para. 25 (defining full restitution as an attempt to reinstate a prior situation); Blake Case, Inter-Am. Ct. H.R. (Ser. C) No. 48, para. 31 (noting that "reparations" is nothing more than a generic term which covers many redressing actions a state can make); Castillo Páez Case, Inter-Am. Ct. H.R. (Ser. C) No. 43, para. 48 (listing some of the ways that a state can make reparations, including "assurances of guarantees that the violations will not be repeated"); Godínez Cruz Case, Inter-Am. Ct. H.R. (Ser. C) No. 8, para. 24 (including emotional harm as an item that a state must address by reparations); Aloeboetoe et al. Case, Inter-Am. Ct. H.R. (Ser. C) No. 15, para. 49 (recognizing that the law can

vary according to the material and moral harm caused. The Court has further accepted that international law governs the obligation to make reparation in all its aspects: scope, nature, forms, and determination of beneficiaries—none of which the respondent state may alter by invoking its domestic law.<sup>86</sup> The Court has followed the international law principle that a state cannot plead its federal structure or its domestic law to avoid complying with an international obligation.<sup>87</sup> Reparations are not meant to enrich or impoverish victims or their heirs<sup>88</sup> and must be proportionate to the rights violated.<sup>89</sup>

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demand reparations of only immediate effects of unlawful acts); *Garrido and Baigorria Case*, Judgment of Aug. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 39, para. 41 (1998) (stating that reparation can include nullification of administrative measures).

86. See, e.g., “*Street Children*” Case, Inter-Am. Ct. H.R. (Ser. C) No. 77, para. 61 (denying a respondent-state the right to modify or fail to comply with international obligations by invoking domestic law); *Blake Case*, Inter-Am. Ct. H.R. (Ser. C) No. 48, para. 32 (observing that the inability of a state to invoke domestic law to overcome international obligation has been universally accepted); *Garrido and Baigorria Case*, Inter-Am. Ct. H.R. (Ser. C) No. 39, para. 42 (implying that this principle has now become more entrenched through repetition in case law); *Aloeboetoe et al. Case*, Inter-Am. Ct. H.R. (Ser. C) No. 15, para. 44 (noting that a respondent state is not able to suspend a judgment with its domestic law); *Godínez Cruz Case*, Inter-Am. Ct. H.R. (Ser. C) No. 8, para. 28 (noting that international reparations must function independently of state law); Advisory Opinion No. 17, Greco-Bulgarian “Communities,” 1930 P.C.I.J. (ser. B) No. 17, at 32-35 (applying the idea that international law takes precedence over municipal law when dealing with relations between states who are treaty parties); *Free Zones of Upper Savoy and the District of Gex*, Order, 1930 P.C.I.J. (ser. A) No. 24, at 12 (explaining that despite this principle the court can not engage in modifications of regulations pertaining to national jurisdictions); *Free Zones of Upper Savoy and the District of Gex*, Judgment, 1932 P.C.I.J. (ser. A/B) No. 46, at 167 (noting one limitation of application of international doctrine in imposition of tax assessment in national zones); *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44, at 24 (relying on the principle to uphold provisions of a treaty between States).

87. See *Garrido and Baigorria Case*, Inter-Am. Ct. H.R. (Ser. C) No. 39, para. 46 (encountering no difficulty in denying the right to plead federal structure to an international obligation); see also “*Street Children*” Case, Inter-Am. Ct. H.R. (Ser. C) No. 77, para. 61 (specifying “scope, nature, forms and determination of the beneficiaries” to fall under regulation by international law).

88. See “*Street Children*” Case, Inter-Am. Ct. H.R. (Ser. C) No. 77, para. 63 (noting that reparations should be dependent only on the damage caused); *Blake Case*, Reparations, Judgment of Jan. 22, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 48,

Moreover, the Court has noted that it cannot compel perpetrators of unlawful acts to erase consequences that are too remote or distant,<sup>90</sup> although as one commentator points out, “the Court is singularly unhelpful in providing guidance to determine what harm will be deemed too remote from the act for the actor to bear responsibility.”<sup>91</sup> The Court has stated only very generally that states must “make reparation for the immediate effects of unlawful acts, but only to the degree legally recognized.”<sup>92</sup>

Procedurally, the Court may order reparations in a separate proceeding following an earlier merits judgment establishing violations under the American Convention. The Court’s Rules of Procedure state that where the Court has made no specific ruling on reparations in a judgment on the merits, the Court shall set the time and determine the procedure for the deferred decision on reparations.<sup>93</sup> The compensation amount is commonly disputed during the reparations phase, and the representatives of victims or their next of kin have had standing to submit arguments and evidence during the reparations phase since 1997.<sup>94</sup> If, however, the parties reach their own agreement on the execution of the merits judgment,

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para. 34 (1999) (evaluating the nature of reparations as dependent on the damage done on “material and moral levels”); Garrido and Baigorria Case, Judgment of Aug. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 39, para. 43 (1998) (denying “exemplary damages” when reparations are called for); *Castillo Páez Case*, Inter-Am. Ct. H.R. (Ser. C) No. 43, para. 53 (stating that reparations are intended to “wipe out the effects” of a violation).

89. See *Castillo Páez Case*, Inter-Am. Ct. H.R. (Ser. C) No. 43, para. 51 (asserting that the reparations made by a state “must” be proportionate to the violations of the American Convention provisions).

90. See *Aloeboetoe et al. Case, Reparations*, Judgment of Sept. 10, 1993, Inter-Am. Ct. H.R. (Ser. C) No. 15, para. 48 (1993) (comparing the effects of a wrong to the ever increasing ripple effect of a stone cast in a lake).

91. Shelton, *supra* note 80, at 161.

92. *Aloeboetoe et al. Case*, Inter-Am. Ct. H.R. (Ser. C) No. 15, para. 49.

93. See Inter-American Court of Human Rights, *Rules of Procedure of the Inter-American Court of Human Rights*, art. 56(1) [hereinafter *Rules of Procedure*] (explaining that the Court has the power to determine the procedure when no specific ruling has been made on reparations), at <http://www1.umn.edu/humanrts/iachr/rule1-97.htm> (last visited Feb. 4, 2004).

94. See *id.* art. 23(1) (adding that if there are several representatives or next of kin, the Court may appoint an intervener to file the pleadings).

the Court must verify the fairness of the agreement and rule accordingly in a reparations decision.<sup>95</sup> This may include verification of whether the state guarantees just compensation to the victims' next of kin and whether it also provides for redress for the various consequences of the human rights violations.<sup>96</sup>

Court supervision of settlements has been somewhat troubling. In the *Maqueda* case, the Court, in an agreement, released a victim claiming unlawful imprisonment by Argentina, conditioned on discontinuation of compensation.<sup>97</sup> Although the Court believed securing the victim's freedom was paramount under the Convention, it seemed too ready to dispense with the remedial objective of reparation.

### III. COMPENSATION AS REPARATION FOR UNLAWFUL DEATH

#### A. INTERNATIONAL LAW

As the International Court of Justice stated in the *Gab ikovo-Nagymaros Project*, “[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it.”<sup>98</sup> Article 36(1) of the ILC Articles reiterates

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95. See *id.* art. 57(1)-(2) (explaining that the Court may decide upon the procedure to determine reparations, and that the Court has the right to verify the fairness of any agreement).

96. See *Durand and Ugarte Case, Reparations*, Judgment of Dec. 3, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 89, para. 23 (2001) (defining the Court's function as one of evaluation of whether consequences of violations are adequately redressed and whether the reparations agreement complies with the American Convention).

97. See *Maqueda Case*, Judgment of Jan. 17, 1995, Inter-Am. Ct. H.R. (Ser. C) No. 18 (1995) (dismissing the case because through agreement, the parties restored Maqueda's right to freedom, and the Court found that agreement valid), <http://www1.umn.edu/humanrts/iachr/C/18-ing.html> (last visited January 30, 2004); see also Shelton, *supra* note 80, at 169 (noting that the Court, after acknowledging the violation of the right to freedom, reserved the power to reopen the *Maqueda* case should the need arise).

98. See *Gab ikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, 55 (Sept. 25) (assuming a duty to mitigate where a wrongful act is found); see also

the general rule that states responsible for internationally wrongful acts must “compensate for the damage caused thereby, insofar as such damage is not made good by restitution.”<sup>99</sup> As the International Law Commission (“ILC”) notes, though entitlement to compensation is uncontroversial and supported by much case law,<sup>100</sup> restitution is frequently unavailable or inadequate.<sup>101</sup> Article 36(2) states that compensation must cover “any financially assessable damage including loss of profits insofar as it is established.”<sup>102</sup> The concept of “damage” here includes material or moral damage, but the phrase “financially assessable” is intended to exclude the award of moral damages to states, since satisfaction is considered the more

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Factory at Chorzów, 1928 P.C.I.J. (ser. A) No. 17, at 27 (viewing the tribunal’s role as applicable to relations only between states).

99. See CRAWFORD, *supra* note 39, at 218 (noting that restitution is frequently unavailable or inadequate, and thus compensation’s role is to “fill in any gaps” in order to ensure full reparation).

100. See *id.* at 219 (noting that reparations are not intended to punish responsible States); see also *M/V “Saiga”* (No. 2) Case (Saint Vincent v. Guinea), 1999 Int’l. Tribunal L. Sea, para. 170 (July 1) (adopting as established law the principle that a wronged state is entitled to reparations); *Papamichalopoulos v. Greece*, 21 Eur. Ct. H.R. (ser. A) at 439 (1995) (holding that the breaching state had an obligation to end the breach and make reparations); *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, 6 Iran-US Cl. Trib. Rep. 219, 225 (1986) (stating that international law is supposed to provide “full” value of property deprived); *Factory at Chorzów*, 1927 P.C.I.J. (ser. A) No. 9, at 21 (insisting that claims to include *clause compromissoire* can not be excluded in an action giving rise to reparations); *Fisheries Jurisdiction (F.R.G. v. Ice.)*, 1974 I.C.J. 175, 203-205 (July 25) (explaining that jurisdiction to determine remedies arises out of a properly raised dispute); *Military & Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 142 (June 27) (noting that the parties’ actions led to express submission to the Court’s jurisdiction to determine remedies).

101. See CRAWFORD, *supra* note 39, at 218 (stating that restitution “may be partially or entirely ruled out either on the basis of the exceptions expressed in Article 35, or because the injured State prefers compensation or for other reasons”).

102. See *id.* (emphasizing that Article 36(2) develops the definition of “damages,” which includes any material or moral damages, by specifying that compensation will include any financially assessable damage, such as loss of profits).



appropriate form of reparation to states for non-material injury.<sup>103</sup> Damage includes that suffered by the state itself or by its nationals.<sup>104</sup>

Historically, compensation for personal injury or wrongful death most commonly arose in the field of the diplomatic protection of nationals or state officials, frequently through the mechanism of mixed claims commissions.<sup>105</sup> Concerning the appropriateness of a monetary remedy for unlawful death, Whiteman restates the truism that “[n]o amount of money can, of course, atone for the death of a person.”<sup>106</sup> Indeed, as Shelton notes, it is important to ensure the use of non-monetary reparations in addition to compensation “to avoid giving states the impression that they can buy the right to violate the rights of others.”<sup>107</sup> Compensation for unlawful death is nonetheless important. As Grotius wrote in 1625:

One who unjustly takes human life is . . . bound to give to this whom the dead man was accustomed to support from a sense of duty, as parents, wife, and children, so much as that expectation of support was worth in view of the age of the person killed.<sup>108</sup>

International practice has long established a duty to compensate those who had an expectation of support from the deceased,<sup>109</sup> although in some cases close relatives have been compensated notwithstanding an absence of evidence as to any actual contribution the deceased made.<sup>110</sup> As Whiteman notes, “[a] claim for death by

103. *Id.* at 218.

104. *See id.* at 220 (including all legal persons, as well as corporations, within the definition of “nationals”).

105. *See id.* at 224 (adding that damages were typically based on an evaluation of the surviving heirs or successors).

106. WHITEMAN, *supra* note 11, at 705.

107. Shelton, *supra* note 33, at 206.

108. HUGO GROTIUS, *DE JURE BELLI AC PACIS*, BOOK II 434 (Francis W. Kelsey et. al. trans., Widley & Son 1964) (1646).

109. *See* T. RUTHERFORD, *INSTITUTES OF NATURAL LAW* 206-207 (Cambridge, J. Bentham 1754) (discussing the obligations arising from injustices).

110. *See* the French Venezuelan Mixed Claims Commission of Heirs of Jules Brun (1906) Ralston’s Report 5, 29; Heirs of Jean Maninat, (Fr. v. Venez.) 10 R.I.A.A. 55, 56 (1903) (explaining that a greater amount of damages were awarded to the next of kin because of the “unatoned indignity to France” by the injuries received by a French national).

wrongful act is made not for the benefit of the estate . . . but for the benefit of the surviving dependents.”<sup>111</sup>

In the *Lusitania* cases, the U.S.-Germany Mixed Claims Commission set out the types of losses that are generally compensable in international law:

[T]he amounts (a) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (b) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add (c) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by claimant.<sup>112</sup>

The losses in (a) and (b) above often are referred to as “material damage” or “pecuniary damage” and commonly include loss of earning and earning capacity as well as medical and other expenses. Quantification of material damages requires an estimate of the deceased's probable life expectancy and adjustments according to a variety of individualized factors.<sup>113</sup>

The losses in (c) above often are known as “moral damage,” including mental suffering, injury to feelings, humiliation, shame, degradation, loss of social position or injury to credit and reputation, and affront to sensibilities associated with an intrusion on the person, home, or private life.<sup>114</sup> It can also be very difficult to quantify moral

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111. See WHITEMAN, *supra* note 11, at 640 (commenting that the claimant state has no duty to present an offer to the claimant if the claimant state feels it is a reasonable offer); LUSITANIA CLAIMS, *supra* note 27, 208-09 (stating that the right to compensation for moral damages does not vest in the claimant through the decedent because the decedent never had such a right).

112. See LUSITANIA CLAIMS, *supra* note 27, at 196 (holding that in death cases, the right of action is for the loss sustained by the claimants, not by the estate).

113. See *id.* (commenting further that the factors used to calculate damages is not exclusive and one may consider other factors); see also WHITEMAN, *supra* note 11, at 682-83 (listing factors used to calculate an indemnity award including the deceased's state of health, vocational risks, earnings, prospects of continued employment and promotion, character, contribution to claimants and probability of continuing contribution, and the number, age, and changing needs of dependents).

114. See CRAWFORD, *supra* note 39, at 223 (citing international law cases where the courts granted compensation for nonmaterial damages); see also *Affaire*

damages.<sup>115</sup> In the case of *Beatrice Di Caro*, the Venezuelan Arbitrations of 1903 awarded 50,000 bolivars, deeming such an award as “just” for moral damage, despite the acknowledgement that “[f]or all this no human standard of measurement exists, since affection, devotion and companionship may not be translated into any certain or ascertainable number of bolivars or pounds sterling.”<sup>116</sup>

Gray argues that in international arbitral practice there are few instances of compensation for pain, suffering, and emotional distress, with the exception of the *Janes* case.<sup>117</sup> One reason suggested is that although moral damages are commonly awarded in Western legal systems, communist legal systems reject such a head of damage.<sup>118</sup> Gray was, however, writing in 1990, and the subsequent global decline of communism has arguably freed international law from this ideological dispute.<sup>119</sup> Subsequent developments firmly support the availability of moral damages for human rights violations.<sup>120</sup> In addition to the generic position in the ILC Articles addressing rights

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Chevreau (Fr. v. U.K.), 2 R.I.A.A. 1113, 1114 (1923) (examining damages in the case of internment); *Di Caro Case* (Italy v. Venez.), 10 R.I.A.A. 597, 597 (1903) (holding that when the Venezuelan government killed a woman’s husband, she was entitled not only to her late husband’s future earnings but also to compensation for the loss of his personal companionship); *Heirs of Jean Maninat*, 10 R.I.A.A. at 81-82 (noting that the victim’s next of kin were entitled to damages because of the extreme indignity Venezuela put upon France by treating a French citizen in an outrageous, illegal manner).

115. See CRAWFORD, *supra* note 39, at 223 (commenting that the loss of loved ones, pain, and intrusion are difficult violations to quantify monetarily).

116. See JACKSON H. RALSTON, *VENEZUELAN ARBITRATIONS OF 1903* 770 (1904) (commenting that the distressing nature of *Di Caro*’s death was also a factor in determining an award for compensation).

117. See GRAY, *supra* note 66, at 34 (emphasizing that an award for damage to reputation is considered exceptional in international arbitration practice); see, e.g., *Janes Case* (U.S. v. Mex.), 4 R.I.A.A. 82, 82 (1926) (holding that compensation would not be given for indignity, grief, and other wrongs).

118. See *id.* (noting that although many Western legal systems allow for compensation based on an act done on the state’s behalf, communism rejects the principle).

119. See *id.* (reflecting on the uncertain nature of an award for moral damages in international arbitrage).

120. See *Basic Principles*, *supra* note 69, at 5 (noting the various recent U.N. resolutions that strengthen the rights of victims of moral damages).

violations, the Basic Principles on Reparation reinforce the appropriateness of moral damages.<sup>121</sup> Basic Principle 23(1) suggests compensation for any economically assessable damage resulting from human rights violations, including:

(a) Physical or mental harm, including pain, suffering and emotional distress;

(b) Lost opportunities, including education;

(c) Material damages and loss of earnings, including loss of earning potential;

(d) Harm to reputation or dignity; and

(e) Costs required for legal or expert assistance, medicines and medical services, and psychological and social services.<sup>122</sup>

Basic Principle 23(2) adds that rehabilitation should include medical and psychological care as well as legal and social services.<sup>123</sup> Moral damages are particularly suitable in cases involving serious human rights violations, given that these violations dangerously impair human dignity.<sup>124</sup>

## B. INTER-AMERICAN COURT

The Court has stated that there may be cases in which *restitutio in integrum* is impossible, insufficient, and inadequate.<sup>125</sup> It has considered this to be particularly so in cases where a state has

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121. *See id.* at 6 (mandating that the international community protect the physical and psychological safety of victims).

122. *See id.* at 10 (resolving that in addition to compensation, victims should also be entitled to other forms of reparation, including restitution, rehabilitation, and satisfaction and guarantees of non-repetition).

123. *See id.* (stating that compensation should include the cost of any professional services a victim may need, including: legal, medical, psychological, or social services).

124. *See id.* (noting that for harm to be subject to compensation, it must be both economically assessable and the result of a violation of international human rights or humanitarian law).

125. *See* *Factory at Chorzów (F.R.G. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, at 48 (stating that when restitution is impossible, other means of compensation must be considered).

violated an individual's right to life.<sup>126</sup> As the Court stated in the seminal case of *Velásquez Rodríguez* (1988):

Clearly, in the instant case, the Court cannot order that the victim be guaranteed the enjoyment of the right or liberty violated. The Court, however, can rule that the consequences of the breach of the rights be remedied and rule that just compensation be paid.<sup>127</sup>

Compensation in death cases will be the primary remedy for damages suffered by the injured party, and includes, as the Court has held previously, both material damages (including loss of earnings and indirect damages such as expenses) and moral damages.<sup>128</sup>

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126. See generally, e.g., *El Amparo Case*, Reparations, Judgment of Sept. 14, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 28, para. 3 (1996) (detailing the killing of fourteen fisherman by Venezuelan police officers); *Garrido and Baigorria Case*, Judgment of Aug. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 39, para. 3-5 (1998) (describing the events surrounding the arrest and subsequent disappearance of two men in Argentina); *Aloboetoe et al. Case*, Reparations, Judgment of Sept. 10, 1993, Inter-Am. Ct. H.R. (Ser. C) No. 15, paras. 3-7 (1993) (recounting an attack by Surinam soldiers on more than twenty unarmed Maroons that resulted in the death of at least six Maroons); *Caballero Delgado and Santana Case*, Reparations, Judgment of Aug. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 31, para. 2 (1998) (recounting the disappearance and possible execution of two Columbians); *Castillo Páez Case*, Reparations, Judgment of Nov. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 43, para. 2 (1998) (stating that the Peru had violated the rights of the late Páez and his next of kin was entitled to compensation); *Neira Alegria et al. Case*, Reparations, Judgment of Sept. 19, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 29, para. 5 (1996) (deciding that Peru violated the right of *habeas corpus* to the detriment of three of its citizens and that Peru should compensate their survivors).

127. See *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4, para. 189 (1988) (indicating that a state guilty of human rights violations must be accountable).

128. See *Godínez Cruz Case*, Compensatory Damages, Judgment of July 21, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 8, para. 37 (1989) (holding that the involuntary disappearance of Sr. Cruz entitles his family to compensation for moral damages); *Garrido and Baigorria Case*, Inter-Am. Ct. H.R. (Ser. C) No. 39, paras. 41, 47 (explaining that "reparation" is a generic term that covers how a state may make amends for the international responsibility it has incurred); *Caballero Delgado and Santana Case*, Inter-Am. Ct. H.R. (Ser. C) No. 31, para. 17 (listing other cases where the Court has used alternative forms of reparations); *El Amparo Case*, Inter-Am. Ct. H.R. (Ser. C) No. 28, 16 (stating that the Court will provide compensation for both material and moral damages); *Aloboetoe et al. Case*, Inter-Am. Ct. H.R. (Ser. C) No. 15, paras. 47-50 (stating that the rule of *integrum instituto* refers to only one way that the effect of an international wrongful act may be redressed).

Compensation for violation of the right to life may be available in cases of forced disappearances even where no corpse was discovered. In *Velásquez Rodríguez* (1989) the Court stated:

The practice of disappearances often involves secret execution without trial, followed by concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible. This is a flagrant violation of the right to life, recognized in Article 4 of the Convention.<sup>129</sup>

In such cases, the Court has flexibly determined the standard of proof necessary to support its judgments, since neither the American Convention, the Statute of the Court, nor its Rules of Procedure regulate the standard of proof.<sup>130</sup> The Court has emphasized that “international jurisprudence has recognized the power of the courts to weigh the evidence freely” and “always avoided a rigid rule regarding the amount of proof necessary.”<sup>131</sup> Consequently, the Court has viewed circumstantial or presumptive evidence as especially important in testing allegations of disappearances, “because this type of repression is characterized by an attempt to suppress any information about the kidnapping or the whereabouts and fate of the victim.”<sup>132</sup>

### 1. *Material Damages*

To determine material damages, the Court generally ascertains who has sustained a loss of income owing to the victim’s death or disappearance.<sup>133</sup> It also may ascertain who the injured parties are, and what family, labor, business, farm, industrial, or other activity

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129. *Velasquez Rodriguez*, Inter-Am. Ct. H.R. (Ser. C) No. 4, para. 157.

130. *See id.* para. 127 (determining the standards of proof applied in the case based on various international law standards).

131. *Id.*

132. *Id.* para. 131.

133. *See Garrido and Baigorria Case*, Judgment of Aug. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 39, para. 58 (1998) (explaining that it is necessary, in determining damages suffered, to identify who or what entity sustained the loss of the victim’s income).

suffered a loss due to the victim's death.<sup>134</sup> For loss of wages, the Court calculates compensation on the basis of the victim's age at the time of death, the years remaining before he or she would have reached the age of normal national life expectancy, and actual incomes, calculated on the basis of the victim's actual wage.<sup>135</sup> For survivors, the calculation includes the time during which they remained unemployed.<sup>136</sup>

In default of precise income information, the calculation may depend on the minimum monthly wage in effect in the country,<sup>137</sup> or in a specific part of the country, such as the rural or non-agricultural sectors. The Court has used as a base salary an amount not less than the cost of the basic food basket, which was higher than the

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134. See *id.* (stating that the first order of business is determining the source that suffered due to the victim's death).

135. See *El Amparo Case, Reparations, Judgment of Sept. 14, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 28, para. 28 (1996)* (granting an indemnity based on the age of the victim's dependents); *Castillo Páez Case, Reparations, Judgment of Nov. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 43, para. 75 (1998)* (noting that anticipated bonuses are also included in material damages); *Neira Alegría et al. Case, Reparations, Judgment of Sept. 19, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 29, para. 49 (1996)* (stating that when the Court cannot determine an actual wage, it may substitute the applicable minimum); see also *Suarez Rosero Case, Reparations, Judgment of Jan. 20, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 44, para. 58 (1999)* (holding that the time a victim remained unemployed can be taken in to account when determining material damages).

136. See *El Amparo Case, Inter-Am. Ct. H.R. (Ser. C) No. 28, para. 28* (stating that damages for survivors is based in part on the time during which they remained unemployed as well as their age at the time of death); *Castillo Páez Case, Inter-Am. Ct. H.R. (Ser. C) No. 43, para. 75* (emphasizing that personal expenses are deducted from a victim's gross income); *Suarez Rosero Case, Inter-Am. Ct. H.R. (Ser. C) No. 44, para. 59* (stating that when the victim is alive the damages may be based on his actual income).

137. See *Aloeboetoe et al. Case, Reparations, Judgment of Sept. 10, 1993, Inter-Am. Ct. H.R. (Ser. C) No. 15, paras. 88-89 (1993)* (detailing the process the Court uses to adjust potential earnings for inflation); *Neira Alegría et al. Case, Inter-Am. Ct. H.R. (Ser. C) No. 29, para. 49* (describing the alternative method for calculation as the minimum monthly wage in effect in the country). *But see* "Street Children" Case, *Reparations, Judgment of May 26, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 77, para. 79 (2001)* (arguing that the minimum wage cannot be applied if the victims do not hold continuous employment).

minimum rural wage.<sup>138</sup> One should calculate compensation on the basis of a definite injury that is sufficiently substantiated to find that the injury likely occurred, so evidence must show whether an improvement in the victim's future income was a "probable certainty."<sup>139</sup> The compensation may include bonuses in salary due.<sup>140</sup> In the *Bámaca Velásquez* case, the Court awarded damages to the family of a deceased guerilla leader who was not earning wages.<sup>141</sup> The Commission argued that the deceased would have earned a salary after the end of the civil war in Guatemala by working in a leadership position in civil society.<sup>142</sup> Compensation consisted of an averaging of the salaries earned after the war by three other guerilla leaders and one Mayan community leader.<sup>143</sup>

Once the loss of income calculation is made, the Court normally deducts twenty-five percent for personal expenses.<sup>144</sup> The Court then

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138. See, e.g., *El Amparo Case*, Inter-Am. Ct. H.R. (Ser. C) No. 28, para. 28 (discussing how the Court used a base salary higher than the minimum rural wage that was an amount not less than the cost of a basic food basket).

139. See *Castillo Páez Case*, Inter-Am. Ct. H.R. (Ser. C) No. 43, para. 74 (holding that a probable certainty of an increase in the victim's income potential was not sufficient to adjust the basis of the victim's future earnings).

140. See *Caballero Delgado and Santana Case*, Reparations, Judgment of Aug. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 31, para. 42 (1998) (accepting the Commission's recommendation that the Court should include unemployment benefits equaling two additional monthly salaries per year in the calculation of lost earnings).

141. See Megan Hagler & Francisco Rivera, *Bámaca Velásquez v. Guatemala: An Expansion of the Inter-American System's Jurisprudence on Reparations*, 9 HUM. RTS. BRIEF 2, 3 (Spring 2002) (asking the Court to award damages to the victim's family in order to acknowledge the violations and to sanction the state).

142. See *id.* (reasoning that since the Court had previously awarded compensation in this manner, the Court ought to award damages based on the salary the victim would have earned after the end of the civil war).

143. See *id.* (clarifying the Court's goal to award damages that would place the victim's family in the financial position they would have been in had the violation against Bámaca not occurred).

144. See, e.g., *El Amparo Case*, Reparations, Judgment of Sept. 14, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 28, para. 28 (1996) (deducting twenty-five percent of the calculated base amount of compensation for personal expenses); *Castillo Páez Case*, Reparations, Judgment of Nov. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 43, para. 75 (1998) (explaining how the Court calculated lost earnings by using the minimum monthly wage multiplied by forty-nine years, the victim's remaining life expectancy, while also subtracting twenty-five percent for personal expenses);



adds to this amount the interest accruing from the date of the events up to the date of judgment.<sup>145</sup> The Court may appoint an actuary to assist in calculations.<sup>146</sup> In one case, the Court calculated the amount that, invested at a nominal interest rate, would have a monthly yield equivalent to the amount of the income the victims would have received during their probable lifetime.<sup>147</sup> Material damage was thus the “present value of an income from their monthly earnings for the rest of their probable lifetime and is . . . less than the simple sum of their earnings.”<sup>148</sup>

The Court awards no compensatory material damages when the death or disappearance of a victim did not cause his or her family or dependants any economic damage, deprive him or her of economic support, or when there is no evidence that the victim had ever provided such support.<sup>149</sup> This approach seems more logical than the murkier position in general international law, since Gray writes that in some cases awards have been given to dependants even where there is no evidence that the deceased supported or would support the claimant.<sup>150</sup> Further, Gray notes that damages to relatives also have

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Neira Alegría et al. Case, Reparations, Judgment of Sept. 19, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 29, para. 50 (1996) (noting that in performing the calculations, the Court deducted twenty-five percent for personal expenses).

145. See, e.g., *El Amparo Case*, Inter-Am. Ct. H.R. (Ser. C) No. 28, para. 28 (indicating that after deducting the twenty-five percent for personal expenses, the Court added the interest accruing from the date of the events to the present to the calculation); *Caballero Delgado and Santana Case*, Reparations, Judgment of Aug. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 31, para. 40 (1998) (stating that interest must be added from the date of the victim's death).

146. See *El Amparo Case*, Inter-Am. Ct. H.R. (Ser. C) No. 28, para. 28 (alluding to the actuary's calculations that the Court used in determining the monetary amounts to go to the victims' families).

147. See *Caballero Delgado and Santana*, Inter-Am. Ct. H.R. (Ser. C) No. 31, para. 39 (explaining that the Court would deduct personal expenses that the victims would have spent during their lifetimes).

148. *Neira Alegría et al. Case*, Inter-Am. Ct. H.R. (Ser. C) No. 29, para. 46.

149. See *Garrido and Baigorria Case*, Judgment of Aug. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 39, paras. 60-61 (1998) (relating that although the victim's relatives contended that the victim was a bricklayer, they had no evidence of his profession, nor was there any proof that any of his siblings or his natural children lived with him or financially depended on him).

150. See GRAY, *supra* note 66, at 37 (noting that tribunals often give no reason for the damages that they award).

been awarded in “many cases” where the relatives have not suffered any pecuniary loss.<sup>151</sup>

The Court also has compensated the “nuclear family’s patrimonial damages” where the disappearance of a victim was detrimental to the family group’s employment or business activities, and redress is based on the principles of equity.<sup>152</sup> The Court recognizes the difficulty of determining such damages, since it is impossible to establish a causal nexus between the act and consequences alleged to have followed (e.g., the bankruptcy of the victim’s family business or the sale of the family home at less than market value).<sup>153</sup>

## 2. Moral Damages

The Court notes that numerous cases in other international tribunals have determined that a judgment of condemnation constitutes adequate reparation *per se* for moral damages.<sup>154</sup> The Court has relied heavily on the jurisprudence of the ECHR in this respect.<sup>155</sup> Yet if the circumstances of the case are serious enough, the Inter-American Court will regard condemnation as insufficient,

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151. *Id.* at 38.

152. *See* Castillo Páez Case, Reparations, Judgment of Nov. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 43, para. 75 (1998) (recognizing the difficulty of determining how integral one member may be to a small, family-run enterprise).

153. *See id.* (noting that the death of an essential family member may have more severe economic repercussions than can be immediately determined).

154. *See, e.g.*, “Street Children” Case, Reparations, Judgment of May 26, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 77, para. 88 (2001) (agreeing that a judgment of condemnation is *per se* a form of compensation, yet that in fairness the Court must order a payment of compensation in this case); *Castillo Páez Case*, (Ser. C) No. 43, para. 84 (citing to several cases from the ECHR that have also decided that a judgment of condemnation constitutes *per se* reparation for moral damages); *Blake Case*, Reparations, Judgment of Jan. 22, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 48, para. 55 (1999) (recognizing that a judgment of condemnation is reparation for moral damages but deciding that in this case, compensation is necessary as well); *Neira Alegria et al. Case*, Reparations, Judgment of Sept. 19, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 29, para. 56 (1996) (explaining that condemnation may serve as a form of reparation and moral satisfaction).

155. *See* Shelton, *supra* note 80, at 166 (highlighting that in *Aloeboetoe*, the Court rejected its own precedent and referenced the practice of the ECHR in deciding moral damages).

and require compensation for moral damages.<sup>156</sup> The Court has thus found that indemnity may be awarded under international law for emotional harm or psychological suffering (i.e. "moral damages," resulting from human rights violations).<sup>157</sup>

The nature of the suffering is central to the assessment of compensation for moral damages. The Court has held that it is characteristic of human nature that anybody subjected to the aggression and abuse involved in grave cases will experience moral suffering or damage; therefore, once responsibility is established or admitted, no evidence of moral suffering is required.<sup>158</sup> Grave cases may include killings, forced disappearances, *incommunicado* detention and torture, and being forced to dig one's own grave, among others.<sup>159</sup> Expert psychological evidence also may explain the

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156. See "*Street Children*," Inter-Am. Ct. H.R. (Ser. C) No. 77, para. 88 (detailing when non-pecuniary damage may be compensated); *Neira Alegria et al. Case*, Inter-Am. Ct. H.R. (Ser. C) No. 29, para. 56 (opining on when moral satisfaction is fair compensation).

157. See, e.g., *Godínez Cruz Case*, Compensatory Damages, Judgment of July 21, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 8, para. 49 (1989) (noting that international law provides for such indemnification).

158. See, e.g., *Aloeboetoe et al. Case*, Reparations, Judgment of Sept. 10, 1993, Inter-Am. Ct. H.R. (Ser. C) No. 15, paras. 91-93 (1993) (awarding the families of men kidnapped and killed by soldiers moral damages of approximately US \$29,000, and awarding the family of a victim who survived a few days before dying a slightly higher amount because of the suffering the deceased endured); *Garrido and Baigorria Case*, Judgment of Aug. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 39, paras. 62-65 (1998) (compensating the families of kidnapping victims with awards ranging from US \$6,000 to US \$75,000, depending on the closeness of the family member's relationship to the victim); see also *Castillo Páez Case*, Reparations, Judgment of Nov. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 43, paras. 86, 87-90 (1998) (holding that the sister and parents of a kidnapping victim were entitled to a total of US \$160,000 in moral damages as a result of the victim's suffering, the anguish and uncertainty resulting from his disappearance, and the lack of information regarding his whereabouts); *Neira Alegria et al. Case*, Inter-Am. Ct. H.R. (Ser. C) No. 29, paras. 16, 57-58 (determining that, because of the brutal nature of the victims' deaths, their families were each entitled to US \$20,000 in moral damages).

159. See, e.g., *Suarez Rosero Case*, Reparations, Judgment of Jan. 20, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 44, paras. 63, 65, 67 (1999) (awarding damages totaling US \$50,000 to the family of a prisoner who was held *incommunicado* and suffered physical and mental abuses); *Aloeboetoe et al. Case*, Inter-Am. Ct. H.R. (Ser. C) No. 15, para. 51 (considering in its assessment of damages the facts that the victims were beaten, knew they were going to die, and dug their own graves).

extent of suffering.<sup>160</sup> Very recently, the Court held that lesser forms of suffering, such as “the impairment of values that are highly significant” to the victims, may be compensable as moral damages.<sup>161</sup> Moral damages also have been awarded to the spouse of a deceased where the responsible government was untruthful, acted in bad faith in judicial proceedings, and sought to damage the petitioner’s reputation.<sup>162</sup>

Partners, parents, children, siblings, and dependents may suffer moral damages.<sup>163</sup> In contrast to successors, dependants must plead and prove moral damages,<sup>164</sup> with the exception of parents who are not successors.<sup>165</sup> Moral damages may be nominal where siblings can prove no affective relationship with the victim, such as where the sibling had minimal contact or interest in the victim during the victim’s life.<sup>166</sup> However, even children who never knew a victim parent are entitled to compensation for the suffering the victim

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160. See, e.g., “Street Children” Case, Reparations, Judgment of May 26, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 77, para. 56 (2001) (utilizing the testimony of a clinical psychologist and two children’s rights experts in assessing the trauma and psychological harm the victims suffered).

161. *Id.* para. 84.

162. See Hagler & Rivera, *supra* note 141, at 3-4 (stating that the Court in the *Bámaca* case ordered Guatemala to pay damages for the moral suffering of Velásquez’s family resulting from the government’s ongoing bad faith acts).

163. See Loayza Tamayo Case, Reparations, Judgment of November 27, 1998, Inter-Am Ct. H.R. (Ser. C) No. 42, paras. 140-143 (1998) (awarding moral damages to the victim’s children, parents, and siblings), <http://www1.umn.edu/humanrts/iachr/C/42-ing.html> (last visited Jan. 24, 2004).

164. See Aloeboetoe et al. Case, Reparations, Judgment of Sept. 10, 1993, Inter-Am. Ct. H.R. (Ser. C) No. 15, para. 75 (1993) (holding that the victims’ dependants must prove moral damages when they seek them).

165. See *id.* paras. 76-77 (explaining that victims’ parents can be presumed to have suffered morally as a result of the death of their offspring, and it is therefore only appropriate for victims’ parents to participate in the distribution of moral damage compensation even if they have not been declared successors). This exception is justified based on the fact that the cruel death of their children will inevitably cause parents to suffer morally. *Id.*

166. See Garrido and Baigorria Case, Judgment of Aug. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 39, para. 64 (1998) (limiting compensation for the siblings of disappeared persons because of a lack of “credible or convincing evidence” that proved an “affective relationship” such that the disappearances would have caused “grievous suffering”).

sustained in life as heirs.<sup>167</sup> The proximity of the relationship is relevant to the determination of compensation.<sup>168</sup>

The Court has noted that it cannot assess suffering and distress in financial terms.<sup>169</sup> Indemnification must be based upon the principles of equity, fairness, and the special circumstances of each case.<sup>170</sup> The Court will award compensation on the basis of a prudent assessment of moral damages, rather than according to an absolute rule or precise evaluation.<sup>171</sup> Prudence and equity do not mean to infer that the Court has absolute discretion in setting the amounts of compensation; rather, the Court must strictly adhere to the methods ordinarily used in the case law to calculate appropriate

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167. See *id.* para. 65 (providing compensation for the children of a disappeared parent regardless of the fact that they had no relations with each other).

168. See *Castillo Páez Case*, Reparations, Judgment of Nov. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 43, para. 89 (1998) (considering, for the purposes of measuring the psychological consequences of the victim's sister's loss, the fact that the sister lived with the victim prior to the disappearance, and that the victim was her only sibling).

169. See "Street Children" Case, Reparations, Judgment of May 26, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 77, paras. 84-86 (2001) (identifying that there are certain damages that fall outside the traditional scope of calculated damages, and thus the Court must consider non-pecuniary damages as well). For example, the Court in "*Street Children*" focused on suffering due to the State's negligence in making adequate efforts to locate, deliver, and bury persons, and to communicate with affected families. *Id.*

170. Cf. *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4, paras. 27-28 (1988) (discussing other "international instruments" that defend indemnification, including the U.N. Human Rights Committee and the ECHR); see also *Godínez Cruz Case*, Compensatory Damages, Judgment of July 21, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 8, paras. 24-25 (1989) (explaining that full restitution of an international violation requires indemnification, which it defines to include both patrimonial and non-patrimonial damages); *Caballero Delgado and Santana Case*, Reparations, Judgment of Aug. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 3, paras. 48-51 (1998) (highlighting that reparations for indemnification are fact specific and not based on "rigid criteria" when mitigating the Commissions' request for damages).

171. See *Castillo Páez Case*, Inter-Am. Ct. H.R. (Ser. C) No. 43, paras. 83-86 (rejecting the ECHR's *per se* rule of law regarding reparations for moral damages, and applying a case by case approach); see also *El Amparo Case*, Reparations, Judgment of Sept. 14, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 28, paras. 34-35 (1996) (underscoring that case law may establish precedent, but because calculating reparations is fact specific, that precedent cannot be invoked as universally accepted).

compensation.<sup>172</sup> Precedent is not an absolute criterion, as one must examine each case individually.<sup>173</sup>

Compensation may take the form of a monetary payment or the assignment of goods and services.<sup>174</sup> As an alternative to monetary reparation for moral damages, the Court recently held that moral damages may be compensated by:

the execution of acts or works of a public nature or repercussion, which have effects such as recovering the memory of the victims, reestablishing their reputation, consoling their next of kin or transmitting a message of official condemnation of the human rights violations in question and commitment to the efforts to ensure that they do not happen again.<sup>175</sup>

Other factors relevant to the calculation of the amount of compensation may include whether the state acknowledged the facts and accepted responsibility,<sup>176</sup> whether the reprehensible conduct of

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172. See *Aloeboetoe et al. Case, Reparations*, Judgment of Sept. 10, 1993, Inter-Am. Ct. H.R. (Ser. C) No. 15, para. 87 (1993) (deferring to precedent government the calculation of damage).

173. See *Neira Alegria et al. Case, Reparations*, Judgment of Sept. 19, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 29, paras. 55-58 (1996) (establishing that precedent with regard to moral damages cannot be binding and that all "special circumstances" of the case must be taken into account); see also *Blake Case, Reparations*, Judgment of Jan. 22, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 48, para. 54 (1999) (citing *Neira Alegria* in its calculation of moral damages to refute the State's claim that damages are not appropriate based on precedent); *Castillo Páez Case*, Inter-Am. Ct. H.R. (Ser. C) No. 43, para. 83 (relying on *Neira Alegria* to consider the unique circumstances of the case when calculating damages); *El Amparo Case*, Inter-Am. Ct. H.R. (Ser. C) No. 28, para. 34 (discussing case law in which the State "acknowledged the facts and accepted responsibility" versus when it did not and highlighting how fact-specific damage awards underscore the importance of maintaining flexibility in calculating reparations).

174. See "Street Children" Case, *Reparations*, Judgment of May 26, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 77, para. 84 (2001) (explaining one alternative to compensate non-pecuniary damages that would require the Court to determine a value by prudently applying both "judicial discretion and the principle of equity").

175. *Id.*

176. See *El Amparo Case, Reparations*, Judgment of Sept. 14, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 28, paras. 32-34 (1996) (citing that both the IACHR and the ECHR give credence to the concept that any time either court recognizes that a right has been violated, reparations for damages suffered should be provided, particularly where the "State has unilaterally recognized its responsibility").

public officials aggravated the suffering,<sup>177</sup> or whether the state failed to investigate properly.<sup>178</sup> Where minors are the victims of human rights violations, the award of moral damages may be higher in order to recognize that the victims were deprived of the special measures of protection the state owes to children.<sup>179</sup>

### 3. *Expenses and Costs*

The Court has stated that expenses connected with a human rights violation fall within the definition of damages but the Court can only award such damages if the plaintiff pleads and proves such expenses.<sup>180</sup> Nonetheless, in some cases, the Court has awarded compensation for expenses incurred by families of deceased victims and to survivors of human rights violations in their representations to national authorities—even though the families failed to present any

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177. See *Garrido and Baigorria Case*, Judgment of Aug. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 39, para. 62 (1998) (explaining that the fact that Province public servants were responsible for the disappearance presumptively caused “grave suffering” to the mother and eliminated the need for any other evidence to prove damages).

178. See *Blake Case*, Inter-Am. Ct. H.R. (Ser. C) No. 48, para. 56 (holding that authorities’ failures to investigate disappearances “generate suffering and anguish, in addition to a sense of insecurity, frustration and impotence”); see also *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4, paras. 32-34 (1988) (suggesting that compensation could include causing the Government to continue to investigate a disappeared person so long as his fate is unknown); *Godínez Cruz Case*, Compensatory Damages, Judgment of July 21, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 8, paras. 30-34 (1989) (identifying the ability of the Court to enforce the Government’s duty to investigate the fate of an unknown person as a part of the victim’s compensation).

179. See “*Street Children*” Case, Inter-Am. Ct. H.R. (Ser. C) No. 77, paras. 89-91 (noting that the “destruction of the life plan” of five abandoned street children created “grave circumstances” that weighed heavily in the calculation of damages).

180. See *Velásquez Rodríguez Case*, Compensatory Damages, Judgment of July 21, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 7, para. 42 (1989) (denying a damage award for costs incurred while investigating the disappeared, because no costs were “pleaded or proven opportunely” at trial and there was no pleading supporting the request); see also *Godínez Cruz Case*, Inter-Am. Ct. H.R. (Ser. C) No. 8, para. 40 (noting that while damages for expenses related to investigation are awarded as part of fair compensation, the lack of proof of such costs incurred prevent compensation in the case at hand).

proof of expenses—on the basis of equity or fairness.<sup>181</sup> In its assessment, the Court stated that it must:

assess prudently the scope of the costs and expenses, bearing in mind the particular circumstances of the case, the nature of the international jurisdiction for the protection of human rights and the characteristics of the respective proceeding, which are unique and differ from those of other national or international proceedings.<sup>182</sup>

The Court may award compensation for reasonable extrajudicial expenses incurred in ascertaining the whereabouts of disappeared or deceased persons, such as when the government covers up what occurred and the authorities fail to investigate the facts.<sup>183</sup> Economic loss has been further expanded to include the forfeiture of income by one spouse who interrupted his or her career to search for a disappeared spouse.<sup>184</sup>

Critics of the Commission have voiced criticism of the Commission in the past for its failure to seek compensation for loss of personal services and the value of the deceased to the family, resulting in “substantially less being claimed in material damages

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181. See *El Amparo Case*, Reparations, Judgment of Sept. 14, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 28, para. 21 (1996) (granting an indemnity award to the families of both deceased victims and survivors to compensate the expenses of their “representations to national authorities”); see also *Neira Alegria et al. Case*, Reparations, Judgment of Sept. 19, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 29, paras. 39-42 (1996) (awarding compensation to families for time and travel expended in the process of seeking legal recourse through domestic courts).

182. “*Street Children*” Case, Inter-Am. Ct. H.R. (Ser. C) No. 77, para. 107; see also *Garrido and Baigorria Case*, Judgment of Aug. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 39, paras. 79-80 (1998).

183. See *Blake Case*, Inter-Am. Ct. H.R. (Ser. C) No. 48, paras. 48-49 (awarding damages for “expenses in the form of airline tickets, lodging, meals, payments for telephone calls”); see also *Aloeboetoe et al. Case*, Reparations, Judgment of Sept. 10, 1993, Inter-Am. Ct. H.R. (Ser. C) No. 15, para. 79 (1993) (awarding damages to the deceased’s next of kin for expenses incurred as a result of gathering information after the killings, searching for the bodies, and seeking recourse with authorities).

184. See *Hagler & Rivera*, *supra* note 141, at 3 (outlining the various types of material damages to which both the disappeared and his family are entitled regarding economic loss).



than was actually suffered.”<sup>185</sup> The Court’s case law now establishes that expenses for transport, domestic assistance, and physical and psychological medical expenses are compensable.<sup>186</sup> Medical expenses may result from the disappearance of relatives, the uncertainty as to their whereabouts, the suffering on learning of their death, and the frustration and impotence in the face of the failed investigations due to government cover-ups.<sup>187</sup> Expenses addressing the aggravation of existing medical conditions also are recoverable.<sup>188</sup> Compensation also has been awarded for damage to the physical health of the spouse of a man who died as a result of hunger strikes.<sup>189</sup>

The Court has dismissed claims for expenses such as groceries, toiletries, clothes, and children’s educational expenses on the basis that an incarcerated victim would have had to pay for those expenses were he or she not in prison.<sup>190</sup> Income forgone by a victim’s relative

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185. See Shelton, *supra* note 80, at 159-160 (explaining that the Commission has based their calculations on “extremely conservative assumptions,” excluding personal services and the value the decedent has to the family). While there is no clear reason why the Commission has taken this approach, one reason discussed was that these factors might have been too subjective or difficult in application. *Id.*

186. See Suarez Rosero Case, Reparations, Judgment of Jan. 20, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 44, para. 60 (1999) (explaining that the victim and his spouse incurred certain expenses only as a result of the imprisonment at issue). With respect to medical expenses, the Court declared that the victim was entitled to compensation for the physical and psychological mistreatment because evidence verified that all treated ailments were the direct consequence of the imprisonment. *Id.* With respect to transportation and domestic help, the Court declared that the victim’s spouse was entitled to compensation of these expenses incurred only as a result of the absence of her husband. *Id.*

187. See Blake Case, Reparations, Judgment of Jan. 22, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 48, para. 50 (1999) (determining that the brother of a disappeared person was “one of the injured parties” and holding the State accountable for all medical treatment he received as a result of the disappearance).

188. See “Street Children” Case, Reparations, Judgment of May 26, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 77, para. 80 (2001) (awarding compensation payments to families of the disappeared that include medicine and medical treatment for existing conditions).

189. See Hagler & Rivera, *supra* note 141, at 4 (noting that the Commission, in *Bámaca Velásquez*, sought compensation for the loss of life due to hunger strikes).

190. See Loayza Tamayo Case, Reparations, Judgment of November 27, 1998, Inter-Am Ct. H.R. (Ser. C) No. 42, para. 131 (1998) (denying compensation for any claim where a “causal nexus to the wrongful acts perpetrated against the

under an employment contract due to time spent defending the victim is also not compensable, since there is no causal nexus to the wrongful act.<sup>191</sup> Though a judgment may order payment of expenses relating to the relatives' representations to the authorities, expenses incurred by other persons or organizations are not payable.<sup>192</sup>

Article 55(1) of the Court's Rules of Procedure may allow for legal costs.<sup>193</sup> The Court has indicated that the concept of costs covers access to justice at both the national level and access to international justice involving the Inter-American Commission and the Court.<sup>194</sup> Prior to the enactment of the 1997 Rules, the Court had awarded only legal costs associated with the pursuit of national remedies for human rights violations while denying legal costs within the Inter-American system.<sup>195</sup> The Court made this distinction because it felt that party-states to the American Convention already separately fund the Commission, which represents victims, and because it dubiously appeared "to assume that rich non-governmental organizations ("NGOs") can afford to represent clients."<sup>196</sup>

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victim" and the damages sought is absent). The Court further denied damages for alleged lost job contracts on this same basis. *Id.*

191. *See id.* (holding that the victim's wife was not entitled to compensation for giving up employment contracts in order to have time to defend her husband because there was no proof to support her claims and no clear causal relationship).

192. *See Caballero Delgado and Santana Case, Reparations, Judgment of Aug. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 31, para. 47 (1998)* (stating that non-relative representations are not reimbursable expenses because the judgment on the merits only recognized compensation for relatives' representation).

193. *See Rules of Procedure, supra* note 93, art. 55(1) (relating that judgments will contain decisions relating to costs).

194. *See "Street Children" Case, Reparations, Judgment of May 26, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 77, paras. 108-09 (2001)* (noting that cost includes the cost to access justice before the Commission and the Court on the international level, and then reimbursing the victims' next of kin based on the costs of pursuing justice); *see also Garrido and Baigorria Case, Judgment of Aug. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 39, para. 81 (1998)* (asserting that when considering the cost amount, the Court may include "legal assistance," and it begins with domestic court proceedings, following through the Commission and Court proceedings, while excepting legal assistance at those levels that is free).

195. *See Shelton, supra* note 50, at 204 (indicating that the Court had never reimbursed attorney's fees and costs for a petition before the Court).

196. *Id.* at 205.

#### 4. Damage to a "Life Plan"

In the *Loayza Tamayo* case, the Court considered the notion of damages to a victim's "life plan," or "*proyecto de vida*," viewing this as a category of damages separate from special damages, loss of earnings, and indirect or consequential damages.<sup>197</sup> Life plan damages deal "with the full self-actualization of the person concerned and takes account of her calling in life, her particular circumstances, her potentialities, and her ambitions, thus permitting her to set for herself, in a reasonable manner, specific goals, and to attain those goals."<sup>198</sup> Life plan is a manifestation of freedom, since an individual is not truly free if he does not have options to pursue in life.<sup>199</sup> The Court found that such options have an important existential value, the elimination or curtailment of which objectively abridges freedom and constitutes the loss of a valuable asset, which the Court cannot disregard.<sup>200</sup>

The Court further held that a claim for loss of life options due to wrongful acts is entirely admissible "to satisfy the exigencies of justice: complete redress of the wrongful injury . . . it more closely approximates the ideal of *restitutio in integrum*."<sup>201</sup> It may be particularly relevant where victims are minors.<sup>202</sup> In *Loayza Tamayo*, the Commission argued for compensation for a surviving victim of unlawful detention and torture, causing serious physical and psychological effects, which prevented the victim from resuming

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197. See *Loayza Tamayo* Case, Reparations, Judgment of Nov. 27, 1998, Inter-Am Ct. H.R. (Ser. C) No. 42, para. 147 (1998) (comparing the notion of a victim's "life plan" to other various types of damages).

198. *Id.*

199. See *id.* para. 148 (conveying the idea that the options an individual has as to how he chooses to lead his life and how to achieve his goals are the manifestations and guarantees of his freedom).

200. See *id.* (holding that the Court must take into account the loss of an individual's options for carrying his life to its natural conclusion as a valuable loss).

201. *Id.* para. 151.

202. See "Street Children" Case, Reparations, Judgment of May 26, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 77, para. 89 (2001) (remarking that if a victim is a minor it is important to consider the failure of the state to provide special measures of protection when evaluating claims for damages).

study and developing her professional and personal goals.<sup>203</sup> Despite recognizing the possibility of grave damage to a life plan caused by violations of human rights, the Court stated in *Loayza Tamayo* that “neither case law nor doctrine has evolved to the point where acknowledgment of damage to a life plan can be translated into economic terms. Hence, the Court is refraining from quantifying it.”<sup>204</sup> It noted, however, that the “victim’s recourse to international tribunals and issuance of the corresponding judgment constitute some measure of satisfaction.”<sup>205</sup>

The Commission and a victim’s representative, the Centre for Justice and International Law (“CEJIL”), pleaded damage to a life plan in the *Bámaca Velásquez* case.<sup>206</sup> The Commission argued that the State’s killing of the victim violated the victim’s right to live his life plan, in addition to arguing for material and moral damages.<sup>207</sup> There was evidence that the victim, a guerilla leader, planned to provide political leadership in civil society following peace accords in Guatemala.<sup>208</sup> CEJIL argued that the deceased’s wife was entitled to compensation for damage to her life plan, on the basis that the unlawful death of her husband had interfered with her plan to raise a

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203. See Hagler & Rivera, *supra* note 141, at 4 (noting that the “life plan” argument could be valid, but not in this particular case, as the Court refused to award damages because it appeared impossible to put monetary value on a victim’s loss of a life plan).

204. *Loayza Tamayo Case, Reparations, Judgment of Nov. 27, 1998, Inter-Am Ct. H.R. (Ser. C) No. 42, para. 153 (1998).*

205. *Id.*

206. See Hagler & Rivera, *supra* note 141, at 4 (explaining that although the Commission requested that the Court consider Bámaca’s loss of his life plan, in deciding the amount to award in compensation, the Court made no such award).

207. See *Bámaca Velásquez Case, Reparations, Judgment of Feb. 22, 2002, Inter-Am. Ct. H.R. (Ser. C) No. 91, paras. 2, 70 (2002)* (arguing that the Court should recognize that Bámaca lost possibilities in “self-realization” and “life options” as a result of the State’s violations against him, including the rights to life and personal liberty).

208. See Hagler & Rivera, *supra* note 141, at 4 (describing the steps Bámaca took to prepare himself for a position in civil society, including learning to read and write and developing leadership skills).

family and live with her husband.<sup>209</sup> The Court rejected these claims.<sup>210</sup>

So far, the Court has not compensated victims of forced disappearances for the destruction of their life plan or that of their relatives or dependants.<sup>211</sup> In *Cantoral Benavides*, however, the Court compensated a victim of unlawful detention and torture for damage to his life plan by requiring the responsible state, Peru, to fund a scholarship for the resumption of the student's university tuition.<sup>212</sup>

### 5. Punitive Damages

Punitive or exemplary damages are generally unavailable in international law,<sup>213</sup> although the case law does not exclude the possibility.<sup>214</sup> The term "reparation," of which compensation is one

209. See *Bámaca Velásquez Case, Reparations, Judgment of Feb. 22, 2002, Inter-Am. Ct. H.R. (Ser. C) No. 91, para. 69 (2002)* (proposing that the victim's wife receive damages as a result of the interruption in her life plan that the State caused when it violated her husband's human rights).

210. See *Hagler & Rivera, supra* note 141, at 4 (noting that, to date, the Court has not ordered compensation for destruction of a disappeared's life plan or for the effect of the disappearance on the disappeared's family).

211. See *id.* (discussing the Commission's failed efforts to win compensation for destruction of the victim's life plan in *Bámaca Velásquez* and other cases before the Court).

212. See *id.* (explaining that the Court reasoned that the State should pay for the victim's tuition when he returned to his studies so that the victim could continue to develop his life plan).

213. See *Re Letelier & Moffit*, 88 INT'L L. REP. 727, 741 (1992) (stating that international law has not accepted the concept of punitive damages accepted as a principle of international law). See generally Nina Jørgensen, *A Reappraisal of Punitive Damages in International Law*, 68 BRIT. Y.B. INT'L L. 247 (1997) (recounting the history and use of punitive damages in international law); Stephan Wittich, *Awe of the Gods and Fear of the Priests: Punitive Damages in the Law of State Responsibility*, 3 AUS. REV. INT'L & EURO. L. 101, 102 (1998) (citing the International Law Commission's draft Articles on State Responsibility while questioning whether punitive damages ought to be a part of international law).

214. See *LUSITANIA CLAIMS, supra* note 27, at 28 ("[I]t is not necessary for this Commission to go to the length of holding that exemplary damages cannot be awarded in any case by any international tribunal."); see also *S.S. "I'm Alone"* (Can. v. U.S.) 3 R.I.A.A. 1609 (1935) (explaining the details of an agreement between the United States and the United Kingdom dealing with U.S. rights of

element, is by nature remedial in function rather than punitive.<sup>215</sup> Domestic legal systems usually award punitive damages in cases of “gross fraud, malice, willful negligence, or oppression.”<sup>216</sup> There is often (but not always) an absence of malice by states held internationally responsible.<sup>217</sup>

Whiteman notes that while arbitrators have rarely awarded punitive damages, diplomatic settlements have seemingly included punitive elements in egregious cases.<sup>218</sup> This suggests that punitive measures, if permissible at all, are a sovereign political function of states rather than within the judicial remit of international tribunals. As stated in the *Lusitania* cases: “as between sovereign nations, the question of the right and power to impose penalties . . . is political rather than legal in its nature.”<sup>219</sup> Theoretically, it is questionable whether punitive damages are compatible with the general principle of international law that no state has jurisdiction over another state (*par in parem non habet imperium*). There is an associated difficulty with the relationship between punitive damages and the vexed question of state criminality in international law.

Gray suggests that in some personal injury and death cases—although the relationship between injury and pecuniary compensation is inevitably imprecise—the compensation amount seems to be greater than expected; there is usually no explanation given for apparent discrepancies.<sup>220</sup> It may be that in such cases,

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entry onto British sea vessels during the prohibition era, including a provision for damages if the United States oversteps its authority); SHELTON, *supra* note 33, at 288-89 (discussing international law cases that have dealt with the issue of punitive damages).

215. See LUSITANIA CLAIMS, *supra* note 27, at 5 (opining that “punitive damages” is a misnomer and stating that “damages” refers to a loss actually sustained).

216. WHITEMAN, *supra* note 11, at 716.

217. See *id.* (remarking that in many cases before international tribunals a non-state actor initiates the wrong against the victim).

218. See *id.* at 722- 33 (describing historical examples of punitive damages resulting from diplomatic settlements).

219. LUSITANIA CLAIMS, *supra* note 27, at 31.

220. See GRAY, *supra* note 66, at 27 (stating that awards sometimes seem to represent more than just compensation but that it is impossible to identify if and to what extent this is true).

where an award contemplates the gravity of a state's acts, or damages are awarded without evidence as to pecuniary loss, the award is punitive in nature, "although not so denominated."<sup>221</sup> Certainly there are cases in which the seriousness of the wrong – as distinct from the seriousness of the injury ensuing from the wrong – is a factor affecting quantification.<sup>222</sup> Shelton identifies a similar possibility in the jurisprudence of the Court, in which "with a dual focus on suffering of the victim and wrongfulness of government conduct, it seems that moral damages may partially substitute for punitive damages."<sup>223</sup>

Exceptionally, U.S. courts have awarded punitive damages under the special regime of the Alien Tort Claims Act in the United States.<sup>224</sup> In *Filartiga v. Pena-Irala*, the U.S. District Court for the Eastern District of New York found that in international law cases involving individual defendants, rather than states, "it [was] essential and proper to grant the remedy of punitive damages in order to give effect to the manifest objectives of the international prohibition against torture."<sup>225</sup> While acknowledging the rarity of punitive damages in international law, the Court felt that cases involving individuals did not give rise to the diplomatic and sovereignty issues that characterized inter-state disputes.<sup>226</sup> The Court stated:

Punitive damages are designed not merely to teach a defendant not to repeat his conduct but to deter others from following his example. To

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221. *Id.*

222. See CRAWFORD, *supra* note 39, at 223 n.573 (noting that international tribunals have taken moral injury into account when granting pecuniary compensation); see also WHITEMAN, *supra* note 11, at 734-35 (describing how the type of wrong that has occurred plays an either implicit or explicit role in reparations decisions).

223. Shelton, *supra* note 50, at 171.

224. See *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 864-65 (E.D.N.Y. 1984) (holding that where the defendant is an individual, as opposed to a sovereign state, one can only realize international law's goal of making torture punishable as a crime by awarding punitive damages).

225. *Id.* at 865.

226. See SHELTON, *supra* note 33, at 84 (explaining that even though punitive damages were not recoverable under Paraguayan law, because torture is a crime that the world has condemned and seeks to deter, they were appropriate under international law where the defendant was an individual rather than a state).

accomplish that purpose this court must make clear the depth of the international revulsion against torture and measure the award in accordance with the enormity of the offense. Thereby the judgment may perhaps have some deterrent effect.<sup>227</sup>

Similar tort cases have found punitive damages to be “proper under the law of nations.”<sup>228</sup>

For its part, the Inter-American Court has held that “fair compensation” in Article 63(1) is compensatory, not punitive, explicitly rejecting the Anglo-American practice of awarding exemplary or deterrent damages as not being part of international law.<sup>229</sup> The Court has stated that punitive damages are not in the nature of its functions and are outside its power as a non-penal court, whose primary function is to “repair” the effects of the violation committed.<sup>230</sup> As the Court stated in the merits phase of the *Velásquez Rodríguez Case*:

The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect

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227. *Filartiga*, 577 F. Supp. at 866.

228. *Martinez-Baca v. Suarez-Mason*, No. C-87-2057-SC, 1988 U.S. Dist. LEXIS 19470, at \*9 (N.D. Cal. Apr. 22, 1988) Punitive damages serve the purpose of punishing the offender and deterring others and, therefore, in the case of torture, furthering international human rights law. *Id.* at \*5-6.

229. *See Velásquez Rodríguez Case*, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4, para. 38 (1988) (holding that the principle of deterrence associated with punitive damages is not currently applicable to international law); *see also Godínez Cruz Case*, Compensatory Damages, Judgment of July 21, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 8, para. 36 (1989) (using the same language as the *Velásquez Rodríguez Case* to explain that the reparations to injured parties under international law do not include punitive damages); *Garrido and Baigorria Case*, Judgment of Aug. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 39, paras. 43-44 (1998) (describing the court’s power as limited to repairing the effects of the violation committed, not awarding exemplary damages).

230. *See Garrido and Baigorria Case*, Inter-Am. Ct. H.R. (Ser. C) No. 39, para. 43 (limiting awardable damages to those for damage done at the material and moral levels).



the victims and to provide for the reparation of damages resulting from the acts . . . .<sup>231</sup>

Although the Court does not use punitive damages as part of its compensation awards, it has ordered broader reparations in particular satisfaction.<sup>232</sup> Such orders are consistent with the international case law on state responsibility for wrongs against foreigners discussed earlier,<sup>233</sup> as well as consistent with the approach recommended by Basic Principle 4 of the Basic Principles on Reparation:

Violations of international human rights and humanitarian law norms that constitute crimes under international law carry the duty to prosecute persons alleged to have committed these violations, to punish perpetrators . . . and to cooperate with and assist States and appropriate international judicial organs in the investigation and prosecution of these violations.<sup>234</sup>

### 6. *Intrinsic Value of Life*

The Court never has awarded compensation for the intrinsic value of the life of a deceased, nor for the loss of enjoyment of life.<sup>235</sup> The Umpire in the *Lusitania* cases consistently refused to award compensation for the “value of the life taken,” insisting that the measure of damage was the pecuniary loss sustained by the claimant

231. *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R. (Ser. C) No. 4, para. 134.

232. See, e.g., *Garrido and Baigorria Case*, Inter-Am. Ct. H.R. (Ser. C) No. 39, paras. 65, 91 (ordering the Argentine government to locate the heirs of the victim of a government-sanctioned kidnapping); see also *Aloeboetoe et al. Case*, Reparations, Judgment of Sept. 10, 1993, Inter-Am. Ct. H.R. (Ser. C) No. 15, para. 116 (1993) (requiring the government of Suriname, as an act of reparation, to reopen and staff a school and medical facility in the village where the relatives of seven victims of state torture and execution reside).

233. See *supra* Part A (discussing state responsibility for unlawful death, and explaining that under international customary law, states are held responsible for the unlawful deaths of foreigners within their jurisdiction).

234. See *Basic Principles*, *supra* note 69, at 7-8 (requiring states to pass domestic laws providing universal jurisdiction for crimes under international law, extradition, surrender, judicial assistance, and cooperation with other states).

235. See SHELTON, *supra* note 33, at 229 (explaining that the Court accepted the idea of awarding damages for the intrinsic value of life, what it called “*proyecto de vida*”, but it failed to make the actual award).

as a result of the victim's death.<sup>236</sup> Courts may fail to recognize the difference between damages for the value of human life, as distinct from the deceased's loss of earnings or moral suffering.<sup>237</sup> Economic experts in the United States have used different risk-based calculations to arrive at a figure of between U.S. \$1.5 million and U.S. \$3 million per death,<sup>238</sup> but it is doubtful whether the very diverse international arena will utilize the same calculations.<sup>239</sup>

Some domestic jurisdictions have sought to quantify the "hedonic" value of human life. In *Sherrod v. Berry*, a federal district court in Illinois accepted expert economic testimony suggesting compensation for the expected pleasure of life and other values beyond mere economic worth, and that this hedonic value of life could be more than thirty times the mere economic value of a life.<sup>240</sup> Such a concept aims to quantify less tangible losses arising from wrongful deaths.<sup>241</sup> Shelton argues that the Court's acceptance of the idea of "damage to a life plan" recognizes the hedonic value of

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236. See WHITEMAN, *supra* note 11, at 705 (suggesting that one reason for refusing to consider the victim's social, financial, and professional standing in the assessment of damages is because the measure of the damage is not the value of the life taken).

237. See SHELTON, *supra* note 33, at 230 (describing the intrinsic value of life as a "concept . . . linked to self-actualization of the person"). By contrast, damages for moral suffering or loss of earnings focus on the impact of the wrongful death on the victim's dependant and family. *Id.* at 262.

238. See *id.* at 246 (describing the various bases for the calculations such as the value of life per year, studying the premiums people charge to incur small risks of death or serious injury, and measuring the amount of money for which a person would exchange their life).

239. See *id.* (explaining that the figures were determined by examining statistics specific to the United States: wages and risks in different jobs, how much people spend on safety related items, and the salary workers demand for high-risk jobs).

240. See *Sherrod v. Berry*, 629 F. Supp 159, 163 (N.D. Ill. 1985), *aff'd* 827 F.2d 195 (7th Cir. 1987) (holding that damages for hedonic value were appropriate in a homicide case because, even though they are hard to measure, they are not speculative). The issue of speculative damages arises when there is uncertainty as to the cause of damage as opposed to uncertainty as to the measure or extent of damage. *Id.* at 164.

241. See Thomas E. Courtney, Jr., *Wrongful Death Damages in California: On the Brink of Full Compensation*, 24 SAN DIEGO L. REV. 1003, 1020 (1987) (arguing that such hedonic damages are a "bold break from traditional assessment of wrongful death damages," but will not be able to be applied in California the same way they were applied in Illinois in *Sherrod*).

life.<sup>242</sup> However, “damage to a life plan” is arguably only one species of hedonic value, since it focuses primarily on the victim’s professional or personal goals and aspirations, rather than on the broader hedonic notion of valuing “the joy of watching children grow, of sharing dinner with close friends, and other pleasures.”<sup>243</sup> Inevitably there will be some difficulty in quantifying the financial value of hedonic loss, and it invites endless technical disputes among economic experts.<sup>244</sup>

Some international case law suggests that “when the official or social position of the deceased is taken into consideration in setting the amount of the indemnity we come very near, if not in fact, to estimating the indemnity in terms of the ‘value’ of the life lost.”<sup>245</sup> Whiteman argues, however, that it is “frequently impossible” to discern the effect of a victim’s official or social position on compensation awards; awards are rarely made explicit and other factors may explain the award.<sup>246</sup> For example, the award may be influenced by gravity of the crime, the status of the perpetrators, the greater earning power of the victim, or the position of the individual as a protected person (such as attacks on diplomats, which goes to the nature and gravity of the offence rather than to the value of the life *per se*).<sup>247</sup>

As a policy matter, it is doubtful whether the official or social position of the victim should have any bearing on compensation,

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242. See SHELTON, *supra* note 33, at 229, 245 (explaining that the Court recognized the validity of hedonic damages in *Loayza Tamayo*). The Court’s assessment took into account the “vocation, skills, circumstances, potentialities, and aspirations” that the deceased could have expected. *Id.* at 229-30.

243. *Id.* at 245.

244. See SHELTON, *supra* note 33, at 246 (illustrating the potential difficulty in calculating non-economic damages by describing some of the various methods economists use to calculate the value of human life).

245. WHITEMAN, *supra* note 11, at 709.

246. See *id.* (explaining that factors other than the social position of the victim may account for higher awards). Such factors include the gravity of the offense—especially when an official of another state perpetrates the crime—and the difference in earnings between a lower income and higher income victim. *Id.*

247. See *id.* (noting that an additional difficulty in assessing the impact of social status on damage awards is the absence of cases with sufficiently similar facts from which to draw comparisons).

since doing so would import subjective social judgments of class and taste into the law of reparations.<sup>248</sup> Even where the deceased is an internationally protected person, a victim's official status should not increase compensation.<sup>249</sup> As the ILC notes, states may claim compensation for personal injuries to its officials or nationals separately from "any direct injury it may itself have suffered in relation to the same event."<sup>250</sup> Thus, as a matter of law, perpetrator states are responsible for the different effects of the same internationally wrongful act; accordingly, one should assess compensation separately.

#### IV. AMOUNT OF COMPENSATION

In international law, Gray notes that international awards for personal injury and death generally lack uniformity.<sup>251</sup> Most decisions give no explanation of the basis for the amount awarded.<sup>252</sup> Whiteman observed earlier that:

[T]here is a very large personal element involved in the settlement of practically every case. In the last analysis in each case someone must make a decision in which he exercises considerable discretion. Even the explanation of the reason for the award of a particular sum of money, though honestly and carefully given, may not wholly explain the calculation of the indemnity.<sup>253</sup>

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248. *See id.* (expressing concern that when the Court considers the official or social position of the victim in determining the amount of damages awarded, the Court comes very close to estimating the "value" of the deceased's life).

249. *Cf. supra* notes 247-248 (explaining that the Court should not consider official status should in assessing damages because damages are meant to redress the survivors' pecuniary loss, rather than assign value to the victim's life).

250. CRAWFORD, *supra* note 39, at 223.

251. *See* GRAY, *supra* note 66, at 33, 37 (proposing that these inconsistencies occur because the tribunal's criteria for assessing damages are too vague and because the tribunal often fails to explain the basis of its awards, thus eroding any value they many have as precedent).

252. *See id.* at 37 (arguing that the courts' failure to explain their bases for awards leaves open the question of whether damages were determined according to the loss suffered by the deceased or by his or her dependants).

253. WHITEMAN, *supra* note 11, at 735.

Quantification of moral suffering especially is “inherently subjective,”<sup>254</sup> and awards are frequently based on intangible factors such as equity and fairness.<sup>255</sup> Moreover, the many unlawful death cases resolved through international settlement rather than arbitration frequently involve highly arbitrary amounts arrived at without any reasoning,<sup>256</sup> such that “it is useless to talk about principles adopted in fixing the amount.”<sup>257</sup> As discussed earlier, the Court has attempted to set out the basis for which compensation is measured for material and moral damage in its judgments. It usually receives competing submissions on various bases for quantifying compensation from the Commission, the victims’ representatives, and the responsible state. In the past, the Court has utilized experts to assist in determining the amount of compensation and costs.<sup>258</sup> The Court’s judgments nonetheless demonstrate significant discretion in awarding compensation amounts, although arguably less so than in the ECHR.<sup>259</sup> The Court has refused to use its own cases as precedents in quantifying moral damages, reserving the right to consider each case according to its unique circumstances.<sup>260</sup> The Court also frequently takes into consideration equity, fairness, and prudence in setting judgment amounts.

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254. See SHELTON, *supra* note 33, at 261 (recounting that because non-economic damages are so difficult to measure due to their subjective nature, awards for similar injuries vary widely).

255. See *id.* at 262 (noting that because of the uncertainty that courts face when assessing non-monetary damages, some argue that courts should assess damages by a set figure, such as unit of time or by how much a reasonable person would have paid to avoid the injury-causing risk).

256. See generally WHITEMAN, *supra* note 11, at 700-04, 736-45 (documenting several cases in which awards for wrongful death were seemingly arbitrarily determined, as the courts involved failed to cite any basis for the amounts).

257. *Id.* at 736.

258. See Shelton, *supra* note 80, at 161 (stating that the Court appoints experts and sends its own Deputy Secretary to gather information regarding the economic, financial, and banking situation of the country when fixing the amount of compensation and costs).

259. See SHELTON, *supra* note 33, at 264 (reporting that the ECHR damage awards can only be understood as being subjective judgments “about the moral worth of the victim and the wrongdoer”).

260. See Shelton, *supra* note 80, at 167 (illustrating that the Court looks at each case on its own facts and rejects using prior cases as precedent).

Commentators have noted that the award amounts in recent cases have been “modest”<sup>261</sup> and that the Court has shown “less generosity towards victims than one might expect based on the text of Article 63(1) and its legislative history.”<sup>262</sup> For example, Shelton observed in her writing in 1998 that:

[T]he Court has never awarded the full compensation it says is due under the test it has articulated. The Court has consistently undervalued the loss of human life, failing to include the monetary value of services rendered to the home and family while at the same time deducting one-quarter of future earnings for “personal expenses.”<sup>263</sup>

The Court does not award separate compensation amounts for each violation under the American Convention.<sup>264</sup> Rather, the compensation amount addresses the injury sustained.<sup>265</sup> Therefore, it is often impossible to discern in unlawful death cases which violation prompted the award because multiple violations may accompany one another.<sup>266</sup> The compensation amount is an aggregation of all the rights violated, as the merits judgment.

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261. See CRAWFORD, *supra* note 39, at 224 (noting that the European and Inter-American Courts of Human Rights have awarded or recommended only modest amounts of compensation or damages).

262. See Shelton, *supra* note 80, at 153 (asserting that, considering the text of Article 63(1) and its drafting history, the Court’s jurisprudence on damages reveals less generosity toward victims than one might otherwise expect).

263. Shelton, *supra* note 50, at 204.

264. See Aloeboetoe et al. Case, Reparations, Judgment of Sept. 10, 1993, Inter-Am. Ct. H.R. (Ser. C) No. 15, paras. 47-50 (1993) (explaining that compensation is made to repair the damage caused by the violations, and awarding compensation for material and moral damages without specific reference to the several violations in calculating those damages).

265. See, e.g., Garrido and Baigorria Case, Judgment of Aug. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 39, para. 47 (1998) (emphasizing that compensation is made for the moral and material damages suffered by the victims).

266. See, e.g., Castillo Páez Case, Reparations, Judgment of Nov. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 43, para. 3 (1998) (noting that Peru violated Article 7 (right to personal liberty), 5 (right to humane treatment), 4 (right to life), and 1(1) (right to effective recourse to a competent national court or tribunal) and thus illustrating that several violations were evident in the case); Bámaca Velásquez Case, Reparations, Judgment of Feb. 22, 2002, Inter-Am. Ct. H.R. (Ser. C) No. 91, para. 2 (2002) (recognizing that Guatemala violated Article 7 (right to

Table A sets out what the Court awarded in major reparation cases between 1989 and 2002, broken down into material damages, moral damages, and expenses and costs. It also shows the percentage of the total amount actually awarded that the Commission claimed during the reparations phase.

Table A: Inter-American Court Reparations Judgments 1989-2002<sup>267</sup>

Case	Rights Violated on Merits	Material Damages	Moral Damages	Expenses & Costs	Total Award	% of Claim
Rodriguez (1989)	Honduras violated Arts 4, 5, 7 [1 deceased]	L500,000	L250,000	Denied	L750,000	31%
Cruz (1989)	Honduras violated Arts 4, 5, 7 [1 deceased]	L400,000	L250,000	Denied	L650,000	23%
Aloeboetoe (1993)	Suriname violated Arts 1, 4, 5, 7, 25 [7 deceased]	\$232,418	\$213,175	\$7,509	\$453,102	18%
El Amparo (1996)	Venezuela violated Arts 1(1), 2, 4, 5, 8(1), 24, 25 [14 deceased, 2 survivors]	\$370,332	\$320,000	\$32,000	\$722,332	-
Alegria (1996)	Peru violated Arts 4 & 7 [3 deceased]	\$88,040	\$60,000	\$6,000	\$154,041	18%

personal liberty), 5 (right to humane treatment), 4 (right to life), and 8 and 25 (the right to fair trial and judicial protection)).

267. See SHELTON, *supra* note 33, at 225 (indicating that all amounts were rounded to the nearest U.S. dollar; for example, two lempiras were approximately equal to one U.S. dollar).

Delgado & Santana (1997)	Colombia violated Arts 2, 4, 5, 7, 8, 25 [2 deceased]	\$59,500	\$30,000	\$2,000	\$91,500	17%
Garrido & Baigorria (1998)	Argentina violated Arts 1, 2, 4, 5, 7, 8, 25 [2 deceased]	Denied	175,000	\$45,500	\$220,500	16%
Páez (1998)	Peru violated Arts 4, 5, 7 [1 deceased]	\$60,022	\$160,000	\$27,000	\$247,022	18%
Panel Blanca (2001)	Guatemala violated Arts 1, 4, 5, 7, 8, 25 [5 deceased]	\$278,345	\$168,000	\$20,000	\$466,345	-
Street Children Case (2001)	Guatemala violated Arts 1, 7, 4, 5, 7, 8, 19, 25 & IATC Arts 1, 6, 8 [5 deceased]	\$140,764	\$291,000	\$51,102	\$482,866	68%
Barrios Altos (2001)	Peru violated Arts 1, 2, 4, 5, 8, 25 [14 deceased, 4 survivors]	\$700,000 to survivors \$2.52 million to deceased		\$3.4 mill		N/A
Durand & Ugarte (2001)	Peru violated Arts 1, 2, 4, 5, 7, 8, 25 [2 deceased]	\$125,000 (by agreement)		\$125,000		N/A
Oroza (2002)	Bolivia violated Arts 1, 3, 4, 5, 7, 8, 25 [1 deceased]	\$130,000	\$245,000	\$32,400	\$407,400	-
Velásquez (2002)	Guatemala violated Arts 1, 4,	\$225,000	\$250,000	\$23,000	\$498,000	-



	5, 7, 8, 25 & IATC Arts 1, 2 6, 8 [1 deceased]					
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From Table A, it is fair to say that up until at least 1997, total awards were indeed modest. As a rough indication, simple calculations from the Table below show that the average total award per deceased victim (including material and moral damages and expenses and costs) was U.S. \$65,000 in *Aloeboetoe*,<sup>268</sup> U.S. \$67,000 in *El Amparo*,<sup>269</sup> U.S. \$51,000 in *Alegría*,<sup>270</sup> and U.S. \$46,000 in *Delgado and Santana*.<sup>271</sup> There is surprisingly little variation in these awards, given that the victims lived in different states, had different average wages, and had different numbers of relatives and dependants. Exceptionally, the amounts awarded were significantly higher in two earlier cases from 1989 – U.S. \$375,000 in *Rodríguez*<sup>272</sup> and U.S. \$325,000 in *Cruz*<sup>273</sup>.

Since 1998, total awards increased above the early to mid-1990s levels. The Court awarded over U.S. \$110,000 per deceased victim in *Garrido and Baigorria*,<sup>274</sup> U.S. \$247,000 in *Páez*,<sup>275</sup> and U.S.

268. Aloeboetoe et al. Case, Reparations, Judgment of Sept. 10, 1993, Inter-Am. Ct. H.R. (Ser. C) No. 15, paras. 2-5 (1993).

269. El Amparo Case, Reparations, Judgment of Sept. 14, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 28, para. 3 (1996). The Court also awarded non-pecuniary damages, including satisfaction of the victims by restoring their honor and reputation, and a reformation of the Code of Military Justice. *Id.* para. 56.

270. Neira Alegría et al. Case, Reparations, Judgment of Sept. 19, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 29, para. 3 (1996).

271. Caballero Delgado and Santana Case, Reparations, Judgment of Aug. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 31, para. 2 (1998).

272. Velásquez Rodríguez Case, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4, para. 3 (1988).

273. Godínez Cruz Case, Compensatory Damages, Judgment of July 21, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 8, para. 12 (1989).

274. Garrido and Baigorria Case, Judgment of Aug. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 39, para. 3 (1998).

275. Castillo Páez Case, Reparations, Judgment of Nov. 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 43, para. 118 (1998).

\$97,000 in the “*Street Children*” case,<sup>276</sup> falling to U.S. \$62,000 per deceased in *Durand and Ugarte*.<sup>277</sup> In *Barrios Altos*,<sup>278</sup> by agreement between the parties, the beneficiaries of fourteen deceased victims were each awarded U.S. \$175,000, while the Court awarded beneficiaries of one more deceased U.S. \$250,000. By 2002, total awards increased further. In *Oroza*,<sup>279</sup> the Court awarded beneficiaries of a deceased U.S. \$407,000, while in *Bámaca Velásquez*<sup>280</sup> the award was U.S. \$498,000 for one deceased. Over time, the Court seemed to become more generous and was coming closer to the view that compensation for unlawful death “should always exceed those awarded in cases of lesser injury, to avoid making it cheaper for the state to kill the individual than to keep him or her alive.”<sup>281</sup>

There is notable consistency in many of the judgments in the percentage of the amount claimed by the Commission that was actually awarded by the Court. For example, in the cases of *Aloeboetoe*, *Alegria*, *Delgado and Santana*, *Garrido and Baigorria* and *Páez*, the Court awarded between sixteen and eighteen percent of the total amount the Commission claimed in its submissions on reparations. Such consistency across diverse claims is indeed remarkable and there are a number of possible explanations. It may suggest that the Commission, or through it the victims, consistently exaggerate loss and make inflated claims for compensation. More likely is that the Court consistently discounts claims by over eighty percent, for unexplained reasons. It was only in the early cases of *Rodríguez* and *Cruz* that the proportion of the claim amount awarded was higher, reaching thirty-one percent and twenty-three percent

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276. “Street Children” Case, Reparations, Judgment of May 26, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 77, para. 54 (2001).

277. *Durand and Ugarte* Case, Reparations, Judgment of Dec. 3, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 89, para. 45 (2001).

278. *Barrios Altos* Case, Reparations, Judgment of Nov. 30, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 87, para. 3 (2001).

279. *Trujillo Oroza* Case, Reparations, Judgment of Feb. 27, 2002, Inter-Am. Ct. H.R. (Ser. C) No. 92, para. 46 (2002).

280. *Bámaca Velásquez* Case, Reparations, Judgment of Feb. 22, 2002, Inter-Am. Ct. H.R. (Ser. C) No. 91, para. 20 (2002).

281. See Shelton, *supra* note 50, at 206 (asserting that the Commission and the Court should avoid giving the state incentives to hide the truth).

respectively. In the recent "*Street Children*" death case, however, the Court awarded sixty-eight percent of the amount claimed by the Commission. Previously the Court awarded such a high percentage of the claim only in personal injury cases not involving death, such as in *Tamayo* (seventy-one percent)<sup>282</sup> and *Rosero* (104%).<sup>283</sup>

It is worthwhile to place the amounts of compensation awarded by the Court in unlawful death cases into a comparative context. In spite of the apparent modesty of its awards, the Court's awards have been more generous than awards for serious personal injury or death resulting from Iraq's invasion and occupation of Kuwait, issued by the U.N. Compensation Commission ("UNCC") in the 1990s. Category B claims in the UNCC covered individuals who suffered "serious personal injury"<sup>284</sup> or whose spouse, child, or parent died during the conflict. Decision 8 of the UNCC Governing Council capped compensation at U.S. \$15,000 (or U.S. \$30,000 for a family) for the death of a spouse, child, or parent.<sup>285</sup> The Commission concluded the Category B claims processing program in December 1995.<sup>286</sup> Out of 6,000 claims seeking U.S. \$21 million in total, the

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282. See *Loayza Tamayo Case, Reparations, Judgment of November 27, 1998, Inter-Am Ct. H.R. (Ser. C) No. 42, para. 71 (1998)* (stating that the victim was unlawfully detained and tortured and has since been released from prison).

283. See *Suarez Rosero Case, Reparations, Judgment of Jan. 20, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 44, para. 34 (1999)* (noting that the victim was incarcerated and received beatings and other inhumane treatment during that time).

284. See *Whelton, supra* note 29, at 620 (describing "serious personal injury" as dismemberment; permanent or temporary significant disfigurement, or loss or limitation of use of a bodily organ, member, function or system; or any injury which, left untreated, is unlikely to result in full recovery). Additionally, the UNCC includes physical or mental injury sustained from sexual assault, torture, aggravated assault, hostage taking or hiding in its definition of "serious personal injury." *Id.*

285. See *Determination of Ceilings for Compensation for Mental Pain and Anguish*, U.N. Compensation Commission, 4th Sess., 22d Mtg., at 2, UN Doc. S/AC.26 (1992) (providing applicable ceiling amounts available to claimants for compensation for mental pain and anguish in different situations).

286. See United Nations Compensation Comm'n, *Category "B" Claims* (stating that the Commission concluded the category "B" claims in December 1995), at [http://www.unog.ch/uncc/claims/b\\_claims.htm](http://www.unog.ch/uncc/claims/b_claims.htm) (last visited Jan. 21, 2004).

UNCC made 3,945 awards worth U.S. \$13.5 million.<sup>287</sup> As of January 22, 2004, of the U.S. \$18 billion paid out to claimants, only \$13.5 million was allocated to pay all Category B claims.<sup>288</sup> As a policy matter, the UNCC appears to prefer compensating property losses while capping death claims at the fairly low level of U.S. \$15,000.

Until recently, the ECHR had seldom compensated personal injury or death.<sup>289</sup> Following a raft of judgments against Turkey and the United Kingdom since 1998, an emerging jurisprudence has developed. Table B shows major awards for violations of the right to life (Article 2 of the European Convention) by the ECHR between 1998 and 2002.

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287. *See id.* (illustrating that the Commission received approximately 6,000 category "B" claims from forty-seven governments and seven offices of three international organizations).

288. *See* United Nations Compensation Comm'n, *Status of Claims Processing* (listing categories of claims the Commission heard and resolved, and award amounts actually paid), at <http://www.unog.ch/uncc/status.htm> (last visited Feb. 1, 2004).

289. *See* SHELTON, *supra* note 33, at 250 (implying that the European Court has not addressed issues of measuring damages for personal injury and wrongful death); *see also* GRAY, *supra* note 66, at 157 (stating that the European Court often awards compensation for moral injury and rejects those claims where injury cannot be proved).

TABLE B: ECHR COMPENSATION AWARDS – ARTICLE 2 (RIGHT TO LIFE) – 1998-2002<sup>290</sup>

ECHR Case	Material	Moral	Expenses & Costs <sup>291</sup>	Total <sup>292</sup>
Güleç v Turkey (1998)	–	50,000	10,000	60,000
Çakıcı v Turkey (1999)	11,534	27,500	20,000, less FF7,000	58,330
Salman v Turkey (2000)	39,321	35,000	21,545 less FF11,195	94,742
Timurtas v Turkey (2000)	–	30,000	20,000 less FF10,245	48,971
Akkoç v Turkey (2000)	35,000	40,000	13,648 less FF3,600	88,286
Tas v Turkey (2000)	–	30,000	14,795 less FF9,700	44,433
Demiray v Turkey (2000)	US\$40,000		US\$2,000 less FF3,700	24,303
Gül v Turkey (2000)	35,000	30,000	21,000	86,000
Ertak v Turkey (2000)	15,000	22,500	12,000 less FF 14,660	48,028
Çiçekv Turkey (2001)	10,000	50,000	10,000	70,000 [2 deceased]
Tanlı v Turkey (2001)	38,755	30,000	12,000	80,755
Jordan v UK (2001)	–	10,000	30,000	40,000
McKerr v UK (2001)	–	10,000	25,000	35,000
Shanaghan v UK (2001)	–	10,000	20,000	30,000
Kelly et al. v UK (2001)	–	10,000	30,000	40,000
Akdeniz v Turkey (2001)	362,340	202,500	26,600 less FF17,500	589,683 [9 deceased]

290. The information compiled in this chart is from cases that one may access in the European Human Rights Reports.

291. The costs for legal aid are not included because the Council of Europe has already paid it.

292. The ECHR most commonly makes compensation awards in British Pounds (£). The author has converted compensation amounts awarded in other currencies into the British Pounds for simplicity of comparison (currency conversion done on Jan. 17, 2003).

ECHR Case	Material	Moral	Expenses & Costs	Total
Orak v Turkey (2002)	€46,457	€26,500	€2,660 less FF4,100	46,666
Edwards v UK (2002)	–	20,000	20,000	40,000
Semse Onen v Turkey (2002)	–	€149,000	17,500 less €1,744	111,305 [3 deceased]
McShane v UK (2002)	–	8,000	8,000	16,000
Anguelov v Bulgaria (2002)	–	€19,050	€3,500	14,032
Orhan v Turkey (2002)	30,000	€60,900	29,000 less €2,455	95,747 [3 deceased]
Öneryildiz v Turkey (2002)	€154,000 for 13 deceased		€10,000 less €2,287	100,630 [12 deceased]
Ülkü Ekinci v Turkey (2002)	–	€15,590	5,201	4,978

It is clear from the cases cited in Table B that the Inter-American Court has given compensatory relief roughly equivalent to that given by the ECHR. Recent awards in the ECHR range from a low of £5,000 (U.S. \$8,090),<sup>293</sup> to a typical mid-range award of £40,000 (U.S. \$64,705),<sup>294</sup> to a high award of £95,000 (US\$153,670).<sup>295</sup>

293. See *Ülkü Ekinci v. Turkey*, Eur. Ct. H.R. No. 27602/95, paras. 10-12, 19, 180 (2002) (describing Ekinci's disappearance, how his body was found the next day with eleven bullets in it), <http://www.echr.coe.int/eng> (last visited Feb. 6, 2004); see also *Öneryildiz v. Turkey*, Eur. Ct. H.R. No. 48939/99, para. 17 (2002) (recounting how a methane explosion caused a landslide, destroying ten slum dwellings and killing thirty-nine people, nine of which were of the Öneryildiz family), <http://www.echr.coe.int/eng> (last visited Feb. 6, 2004).

294. See *Edwards v. United Kingdom*, 35 Eur. Ct. H.R. 487, 520 (2002) (awarding £20,000 for non-pecuniary damage and £20,000 for costs and expenses); see also *Orak v. Turkey*, Eur. Ct. H.R. No. 31889/96, para. 114 (2002) (awarding €26,500 for non-pecuniary damage and €2,660 less FF4,100 for costs and expenses), <http://www.echr.coe.int/fr> (last visited Feb. 6, 2004); *Jordan v. United Kingdom*, 37 Eur. Ct. H.R. 52, 103 (2003) (awarding £10,000 for non-pecuniary damage and £30,000 for costs and expenses); *McKerr v. United Kingdom*, 34 Eur. Ct. H.R. 553, 600 (2002) (awarding £10,000 for non-pecuniary damage and £25,000 for costs and expenses); *Shanaghan v. United Kingdom*, Eur. Ct. H.R. No. 37715/97, para. 150 (2001) (awarding •10,000 for non-pecuniary damage and •20,000 for costs and expenses), <http://www.echr.coe.int/eng> (last visited Feb. 6, 2004); *Kelly v. United Kingdom*, Eur. Ct. H.R. No. 30054/96, para. 170 (2001)

Though the cost of living in Europe and South America differs, a comparison is instructive for two reasons. First, many of the death cases in the ECHR involve Turkey, which has a lower cost of living than much of Europe and is comparable to Latin and South America. Second, death cases involving the United Kingdom ("U.K."), where the cost of living is higher, have not involved awards for loss of wages because contribution to dependants has not been proven. Accordingly, awards were not inflated by higher U.K. wages. In any event, the most recent awards in the Inter-American Court for unlawful death have been markedly higher than those in the ECHR.

## CONCLUSION

The reparations decisions of the Court have made an enduring contribution to the international case law on compensation for unlawful death. Its jurisprudence has consolidated the applicability of the rules of state responsibility to the field of international human rights law, expanding the limited international legal personality of individuals. It has sought to entrench the primacy of *restitutio in integrum* in the law of reparations, helping to dispel lingering doubts about the status of that remedy. At the same time, the Court has emphasized that restitution may be impossible or inadequate in cases of serious human rights violations, particularly concerning unlawful death.<sup>296</sup> In such cases, the Court has routinely ordered compensation for material and moral damage, 'becoming more generous in its awards over time.'<sup>297</sup> The Court also has given serious consideration to broader heads of damage, such as damage to a life plan and the

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(awarding •10,000 for non-pecuniary damage and •30,000 for costs and expenses), <http://www.echr.coe.int/eng> (last visited Feb. 6, 2004).

295. See *Salman v. Turkey*, 34 Eur. Ct. H.R. 425, 491 (2002) (awarding £39,320.64 for pecuniary damage, £35,000 for non-pecuniary damage, and £21,544 for costs and expenses).

296. See *supra* Part C.2 (suggesting that *restitutio in integrum* is impossible in cases of unlawful death because the victim cannot enjoy the right to life, and thus compensation is granted for damages suffered by the injured parties).

297. See *supra* Part C.2 (a)-(b) (describing how material and moral damages are computed and commenting that they may include loss of wages and emotional or psychological damage).

nuclear family's patrimonial damages.<sup>298</sup> It has, however, refrained from compensating the intrinsic value of life or hedonic damages.<sup>299</sup> The Court has forcefully demonstrated the invaluable contribution that regional enforcement mechanisms can make to the consolidation and progressive development of international law.

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298. *See supra* Part C.2 (d) (explaining that though the Court has contemplated awarding damages based on the loss of a life plan, the Court seldom makes awards in this category).

299. *See supra* Part C.2 (f) (questioning how the Court would actually calculate the hedonic value of life or the value of the life lost, as it is a subjective judgment).